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The Limits of Liberal Justice: An Exploration of
Liberalism's Production of Conflict Through the
Criminal Justice and Public Order Act 1994

by

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Abstract

This thesis aims to give a certain understanding of liberal justice. It argues that such a system of justice cannot provide the structure for stability and inclusion that its supporters claim for it; rather, it is suggested here, it is committed to conflict and exclusion. This position is developed through consideration of a recent piece of legislation, namely section 5 of the Criminal Justice and Public Order Act of 1994. This Act criminalised various activities associated particularly with travellers, environmental protesters, squatters and festival-goers. It is argued that the criminalisation of these social groupings is not in some sense a failure of liberalism, but is rather central to its self-definition.

The argument is divided into three sections. It is initially developed through conceiving the problem as being a dispute over access to and use of land. The Act strengthens private property rights in land by criminalising specific activities which take place on that land. I attempt a reconciliation between the two sides through a consideration of liberal private property theory's possible compatibility with hypothetical demands of the groups targeted by the Act. This consideration particularly focusses on the libertarian theorists, Nozick, Narveson and Steiner. The conclusions to this discussion are somewhat confused.

Thus to understand how this section of the Criminal Justice and Public Order Act may be typical of liberal justice it is situated within a broader discussion of liberal theory. Rawls and Hayek are of primary interest in this second section. Through this discussion, in particular of the conception of the self basic to liberal justice, an understanding is gained of how liberal justice may be committed to criminalising and therefore excluding some social groupings. Using some ideas from Foucault we then see how this process of criminalisation may be applicable to understanding the legislation under consideration. Furthermore this understanding extends further the reading of the conflict and exclusion inherent in liberal justice more generally.

The final chapter suggests the beginnings of ways towards a more genuinely inclusive political society. Most specifically it argues that the problem that the Criminal Justice and Public Order Act raises can only be addressed through a more wide-reaching system of public property.

In this work I rely on a wide range of sources. Some of these have been given above. I also draw heavily on parliamentary debates and newspaper and magazine articles. It should not be concluded from this that my purpose is to give an empirical analysis of the Criminal Justice and Public Order Act. Rather it is through taking certain angles on this Act that understanding of liberal justice can be deepened.

Chapter One: The Problem of Conflict in Liberal Societies

Introduction:

The importance of property as a political and economic category in our public life has, some have commented, declined in recent times.¹ Certainly the battle between socialism and the free-market appears, for the moment at least, to have been fought and won. The rights of private property are not threatened today. More broadly, liberalism as the protector of private property stands triumphant.

This thesis undertakes a certain exploration of private property. It does not engage, except tangentially, in discussion of this worrying hegemony of the free-market. Yet neither does it hold that consideration of property can be of little interest to the political philosopher. Its interest, so far as the present context goes, takes two forms, one particular and one general. (1) Accepting the present apparent inevitability of the free-market does not mean that there are not smaller issues to do with property to be fought out within this system. Here, I address in some detail one of these smaller skirmishes. (2) The implications that discussion of this issue has for our thoughts on the liberal theories of justice which attempt to justify the rights of private property.

(1) The land question, as one of these smaller skirmishes, has been the subject of revived interest in the past few years. In part, at least, this revival has been prompted by the acknowledgement that questions of environmental and social justice may not be separable

¹ See, for example, A.Ryan, Property and Political Theory, (Oxford, Basil Blackwell, 1984), ch.7. For an alternative view see A.Carter, The Philosophical Foundations of Property Rights, (Hemel Hempstead, Harvester Wheatsheaf, 1989), p.viii.

from the ownership of land. The protest movements of the 1990s, the eco-activists, those reclaiming the streets or building squatted communities in the middle of the city, the ravers' collectives and the travellers' festivals, have common roots in a system of land-ownership which excludes their claims. Thus The Guardian carried an article in 1995 which argued,

'The roads programme, the destruction of our wild places and archaeological remains, the abominable treatment of farm animals, the persecution of gypsies, travellers and protesters are not the sources of injustice but merely its symptoms. Unless the environmental and social justice movements address the ownership of land, they will for ever be playing at the margins of political change.'²

In particular, the Criminal Justice and Public Order Act of 1994 (hereafter the CJPOA) has been central in this acknowledgement of the importance of land. For through its strengthening, or at least selected strengthening, of private property rights in land, it is an attack on these protest movements and lifestyles. More recently, and in response to the new Labour government's perceived lack of sympathy for certain traditional activities that take place in the countryside, there has been a mobilisation of landowners in an attempt to protect their interests, and their property. Land is again an issue with which political and social philosophy might engage. Most specifically, the justice of different systems of land ownership might be considered.

(2) My engagement with the land as part of the private property debate is, however, not a direct one, insofar as I do not propose to offer a detailed moral and political analysis of how land ownership might be structured. Rather my interest is in the conflicts that private property in land may produce. Consideration of the CJPOA forms the focus here. Most obviously these conflicts might be between those excluded from the land and those with the power to exclude

2 G. Monbiot, 'Whose land', The Guardian, 22. 2. 1995, p.6.

them. I argue that there is a more fundamental source of conflict at work as well, one that is buried at the heart of liberal theory. The CJPOA is part of this process of conflict production.

My eventual aim, then, is larger than a consideration of just this Act or even the broader problem of the ownership of land. It is to question liberalism's theoretical capacity to engage in certain problems that confront liberal societies. The problem I explore has to do with private property. To this extent, to return to the claim made in the first sentence of this chapter, it is still a relevant category to address. Yet its greater significance, here, lies in what it has to tell us about liberal justice as a whole.

To sum up, it could be said that my intention is to approach a familiar problem from an unfamiliar angle. The familiar problem is the extent to which liberal justice can really provide the structure for an inclusive, stable society. This problem is, however, introduced through and informed by exploration of the particular practical issue under consideration, that of the CJPOA, and how the conflict that it produces may be addressed through liberal theories of property.

This opening chapter takes these two points further. The contents and consequences of the CJPOA are outlined, with a more extended discussion of the travelling way of life as one of the forms of life affected by the Act. The conflict between those groups affected by the Act and the rights of private landowners is set up through the suggestion of two hypothetical demands that may articulate some of the interests of the former group, which later in the thesis are judged for their compatibility with liberal property theory. In the larger context, the CJPOA is situated within more general problems of stability and conflict within liberal

societies. Different ways of conceiving these conflicts are considered; in particular, the distinctive approach that will be taken to the CJPOA as conflict is articulated.

1. The Criminal Justice and Public Order Act 1994

1.1 A fight for the land:

Section V of the Criminal Justice and Public Order Act contains some of the most notorious, and most vociferously opposed, legislation of the 1990s. It provides for the new offence of aggravated trespass, which makes trespass on land a criminal offence if there is an intention to disrupt a lawful activity which is taking place on that land.³ This offence in effect criminalises the activities of hunt saboteurs and road protesters in particular. Travellers, both New Age and gypsies, are affected. The Act prescribes for a criminal offence if two or more people are trespassing on land with the intention of residing there and if damage has been caused to the land (this damage might be no more than urinating in the corner of a field), or if there are six or more vehicles on the land. In addition, the duty of local authorities to provide sites for travellers has been removed.⁴ Festivals and raves, part of the travellers' lifestyle, are also targeted. Unlicensed gatherings of more than a hundred people on land at which amplified music is played are prohibited. Police may arrest anyone within a five mile radius suspected of going to such a gathering.⁵ The eviction of squatters is made quicker through the introduction of a fast-track interim possession order, non-compliance with which attracts criminal sanctions.⁶

³ See ss. 68-69

⁴ See ss. 61-62 and 80

⁵ See ss. 63-67

⁶ See s.76

Much more might be said about the Act. Chapter six will go into more detail on certain provisions. For the moment let us note what appears to be a problem. The Act, on the face of it, as suggested above, strengthens the rights of private property in land.⁷ By doing so it excludes certain activities from taking place on that land. On the one hand we have the private landowners; on the other we have the excluded parties whose activities demand access to this same land.

Not that it should be thought that the CJPOA has initiated this conflict. It has merely prescribed on it in a certain way. It is in the specifics of this prescription that its interest to us lies. These specifics, however, must wait till later chapters. More immediately we may note a tension between those ways of life targetted by the Act and the societies in which they live as certainly not limited to the intolerances of too many years of Conservative Party rule.

Taking just one example from the groups primarily affected by the Act to look at in more detail,⁸ we can see the CJPOA as merely the latest in a long line of legislative Acts aimed at the lifestyle of travelling people. Most recently there was the Public Order Act of 1986, a result of the mass trespasses of the early 1980s. It is important to make a clear distinction between the different types of travellers it is aimed at, broadly the gypsies and the new age travellers. In many ways they represent very different interests, and the CJPOA could be regarded as having distinct intentions towards each grouping.⁹ Yet travellers as a whole

⁷ In fact, as shall be seen in later discussion, putting it this simply rather distorts the complexity of the Act's relation with private property. In a very important way the Act actually weakens the rights of private property. But for the moment it captures the possible incompatibility between property holders and non-property holders that the Act might be seen to lead to. And of course this 'straying' from the particulars of the legislation allows consideration about more general problems in liberal societies.

⁸ It would be interesting to consider other examples. Tony Thomson, 'Travelling Light', *Land Essays*, vol.2, (Oxford, This Land is Ours, 1996), p.2, explores the importance of the festival in history as an expression of a community relationship with the land. Not mediated by the usual structures of power of the church, state or landowner they were perceived as dangerous and there have been numerous attempts to ban them.

⁹ It could be argued that the intention of the Act is to repress the lifestyles of new age travellers whilst assimilating gypsies into

category have always presented a problem for the state, including the liberal state. L.Lloyd has argued that 'Travellers occupy a profoundly symbolic role...representing a lack of order, non-conformity and a freedom from the everyday rules of life which apply in the non-travelling world.'¹⁰ The reaction to this difference has been a mixture of repression and assimilation, both attempts to obliterate the difference. The death penalty was introduced for gypsies in 1563, only the beginning of what has been a difficult history for the gypsies in England.¹¹ Only in the post-war years were attempts made to deal with the gypsy issue constructively, culminating in the Caravan Sites Act of 1968 which laid a duty upon county councils and London boroughs to provide adequate sites for travellers in their area. The problems associated with the Act were manifold though with many councils simply ignoring their duty to provide sites.¹² Furthermore, and surprising in the light of this lack of site provision, are the number of designations made under the Act, giving much stronger powers to authorities once sites have been provided, and the very few directives issued by the Secretary of State forcing local authorities to provide sites for travellers.¹³ As Okely points out, despite the apparent respect on paper at least for the travelling way of life in the 1968 Act, its main aim was to provide permanent sites in which travellers might settle.¹⁴

the settled community. It is interesting, and profoundly disturbing, how gypsies, a racial grouping, have been lumped together with the not unusual objects of public scorn and abuse, ravers, squatters, new age travellers, hunt-saboteurs and road protesters. It is bad enough that these groups are so hounded; the implications of course when such hounding takes on a racial aspect are much more frightening. See H. O'Nions, 'The marginalisation of gypsies', The Web Journal of Current Legal Issues, (1995), for an argument that discrimination of the gypsies is based on a failure to regard them as a racial, rather than simply a social, grouping.

10 Cited in R.Sandland, 'Travelling: back to the future?', New Law Journal, 144 (June 3, 1994), p.752.

11 For a more extended discussion of the history of the gypsies in England see A.Fraser, The Gypsies, (Oxford, Blackwell, 1992), pp.112-22, and J.Okely, The Traveller-Gypsies, (London, Cambridge University Press, 1983), ch.1.

12 A DoE consultation paper 'Reform of the Caravan Sites Act 1968' of 1992 estimated that of the 13500 gypsy caravans in England and Wales more than 4500 were parked on unauthorised sites; see A.Beale and R.Geary, 'Abolition of an unenforced duty', New Law Journal, 145 (January 20, 1995) p.47. This lack of site provision is due in large part to gypsy unpopularity amongst the voting public, as Sir John Cripps found: 'it is not possible...to overstate the intensity of feeling, bordering on the frenetic, aroused by a proposal to establish a site for Gypsies in almost any reasonable location' (D/E 1977 para.3.19), cited in O'Nions, 'The marginalisation of gypsies', p.3. Neither do these figures take account of new age travellers' vehicles on unauthorised sites.

13 Beale and Geary, 'Abolition of an unenforced duty', state that whilst 106 designations have been granted only 5 directives have been given, p.47. In effect, the removal of the statutory duty on local authorities to provide sites for travellers in the CJPOA is relatively insignificant since this was a duty that was largely ignored anyway.

14 Okely, The Traveller-Gypsies, p.21.

So the CJPOA is merely a culmination in this process of legislating against travellers, representing both an attempt to repress a lifestyle through criminalising the way in which that lifestyle can take place and to eventually assimilate into the accepted order through that repression. A consultation paper preceding the CJPOA reveals a wish to persuade travellers to adopt a settled lifestyle: 'the Government believes that it may be necessary to provide advice on education, health and housing which encourages gypsies and other travellers to settle and, in time, to transfer into traditional housing.'¹⁵

Of course the persecution of travellers has not just been limited to liberal polities.

Undoubtedly such persecution has been worse in less liberal times and continues to be worse in less liberal states, the position of gypsies in eastern Europe at the moment providing one particularly pertinent example.¹⁶

1.2 The hypothetical demands:

It is not my intention to make a case for the claims to land from travellers or from other groups affected by the CJPOA. My concern, here at least, is not whether these groups should have access to this land, but rather what we learn about liberalism if this access is denied. It is enough to note that they do have claims, regardless of their moral worth, and that these claims may cause a problem when put against the rights of private property holders in land.

The demands made upon the land by the groups targetted by the CJPOA are various.

¹⁵ 'Proposals for the constructive reform of the Caravan Sites Act 1968' (D/E 1993 paras. 27 and 28) cited in O'Nions, 'The marginalisation of gypsies', p.11.

¹⁶ See, for example, O'Nions, 'The marginalisation of gypsies', pp.12-13.

Travellers want places to stop and park up for a while, and sites for festivals and gatherings. Ravers want places for parties. Eco-protesters want rights guaranteeing them access to land for protest. Squatters want a roof over their heads if the building is empty. It would be difficult to provide an articulation of these complex and wide-ranging demands. Instead I put forward certain hypothetical demands which broadly embody the various demands outlined above. This approach has the advantage of simplicity, moving analysis to a theoretical level, which can then be used as a way of judging the more confused empirical level. It also means that my analysis is not limited to the particular case in hand, but might be used in a wide range of disputes within liberal societies. For my real concern, as stated earlier, is not the CJPOA as such but rather the broader problems for liberal societies that the Act embodies. It is significant in this regard that the CJPOA has in fact been something of a failure as law. As early as 1995 its shortcomings were evident. The Independent suggested four reasons for these: (1) some provisions are impractical to implement; (2) ambiguity in drafting; (3) confusion amongst police as regards implementation; (4) less problematic powers already exist to deal with similar offences.¹⁷ The possibility that the Act is little more than a political gesture will be taken up in chapter six, but from the outset I want to make it clear that it is not because of the specific importance of the Act as law that I undertake to consider it. It has been remarked that the biggest success of the Act has been to bring together and politicise the groups at which its provisions are aimed.¹⁸

Bearing these comments in mind, the hypothetical demands are:

¹⁷ H.Mills, 'It takes a bad Act to make the law a farce', The Independent, 26.9.95, p.4. R.Card and R.Ward, The Criminal Justice and Public Order Act 1994, (Bristol, Jordans, 1994), p.49 and 56-57, suggest that other provisions of the criminal law would be sufficient to deal with most of the conduct addressed in the Act.

¹⁸ Mills, 'It takes a bad Act to make the law a farce', p.4.

- (1) use of other people's land with their consent
- (2) use of other people's land without their consent

Exactly how these are to be defined will become clear in subsequent discussion. In a sense any selection of hypothetical demands will be arbitrary. The above two may be justified insofar as they are unspecific enough to allow for at least some of the concerns of the groups involved.¹⁹ In practice opposition to the CJPOA, and the movements associated with this opposition, has been of various kinds, and again it is important to note here that I simplify it to explore a point broader than one relating just to the CJPOA.

More important is to note that these two demands are not both demands for the relaxing of private property rights. Demand (1) is in fact a demand for the strengthening of such rights. This may seem rather confusing for it suggests that the CJPOA, in opposing these demands, both strengthens and weakens private property. However, this apparent confusion is significant; as shall be argued its weakening of private property rights so as to disallow certain consensual activities taking place on land, is typically liberal in its targetting of certain social groupings.

Bearing these comments on the demands in mind, the argument of this thesis as far as the CJPOA is concerned is essentially one of a search for a compatibility between the hypothetical demands of the targetted groups and liberal property theory. If this compatibility might be argued then we could say that the CJPOA is an illiberal piece of legislation, for liberal theory would be compatible to that which the CJPOA proscribes. If this compatibility cannot be

¹⁹ The landrights campaign group, This Land is Ours, has a much more specific set of objectives for realising social and environmental justice as regards the land. See This Land is Ours Information Pack, (Oxford, This Land is Ours, 1995).

argued then it may be suggested that the CJPOA is a liberal piece of legislation, for liberal theory would be in accordance with the proscriptions of the CJPOA.²⁰ It is concluded that liberal property theory may, in the context of this particular dispute, be incompatible with both demands. This is neither an easy nor a conclusive argument. It is one which is informed by, and which in its turn, informs a more general analysis of liberal justice. Thus eventually we may understand the CJPOA as liberal justice, and have an understanding of liberal justice as committed to legislation such as the CJPOA. Not that such consideration can on its own be a criticism. The killing of another human being is proscribed (with qualifications), and rightly so, in liberal societies, just as it is, and must be, in any legal code, though the boundaries of these qualifications may significantly vary. So to say something is part of liberal justice is to say little of its merits. More argument is of course needed. Even this argument may fail to carry conviction. What it may reveal is what one has to accept if one accepts liberal justice.

Before exploring what these various arguments might be, we need to situate the CJPOA within a larger framework, both theoretical and practical, of certain problems of support for liberal societies.

²⁰ It is interesting to note, though it is not essential for my argument here, that much of the opposition to the CJPOA has been on the grounds of its supposed illiberality. One of the implications of my argument is, of course, that we need to articulate our opposition to such legislation in a different way. See for example Jeremy Corbyn in a Commons debate on the Act. Of the provision of sites for travellers he suggests that the legislation in the Act reveals the 'worst face of intolerance of the Tory party; saying that we do not want these sites anywhere, that we do not want a travelling community, that we do not want or believe in a society that encompasses different ways of life from the ones that they understand', (Hansard, 19.10.94, p.370). In contrast, Sir Ivan Lawrence (Conservative) refers in a debate in the Commons on this section of the Act to the 'trendy liberalisation of the 1960s' which 'ought to have been reversed sooner.' (Hansard, 11.1.94, p.54). In the same debate, Ann Winterton (Conservative) argues that the 'Government must have the courage to say that certain practices are fundamentally and objectively wrong. Unless they accept that principle and distance themselves from the liberal nostrums that have underpinned public policy since the 1960s, the tide of crime will continue to rise until it rots the very heart of our society.' (Hansard 11.1.94, p.81) Thus the Tory party may be seen as not interested in the priority of the right over the good, but rather in dictating what the ends of people's lives should be.

2. The stability of the liberal state:

The problem of conflict plays a central role in this work. Yet it is little analysed. In a sense its meaning is obvious enough. It involves, at least and certainly in the context it is used in here, two or more people with incompatible goods *and* who wish to pursue those goods. Thus A and B may have incompatible goods if they have only \$5 and A needs \$4 and B \$3; their goods will conflict if they both wish to fulfil these goods out of the \$5. Liberal justice, as we shall see, is premised upon just such conflicts in the private sphere, and they need not concern us too much here. It is when they move to a public level that they become a problem.

Any treatment of these public conflicts demands at least an awareness of, if not answers to, two important questions: 1) are all such conflicts eventually resolvable? 2) is the existence of such conflicts a good or bad thing?

As for the resolution of conflict, such a utopia of harmony has been the dream of both liberals and socialists in this century. Modernity, it has been suggested, has its heart in the future. For it is the future that is to be the place of emancipation. Bauman comments on this faith in the future as being the 'Grand Idea at the heart of modern restlessness.'²¹ At each end of modernity's political spectrum we see this belief, from liberalism's attempt to coordinate the varying goods of individuals within one conception of the right, to socialism's attempt to

21 Z. Bauman, *Postmodern Ethics*, (Oxford, Blackwell, 1993), p.225. Bauman also argues that this constant looking to the future provides a justification for present suffering. It is perhaps plausible to suggest that the argument pursued here, that believers in the eventual resolution of all conflicts in fact need conflict which is then hidden, is merely another instance of this institutionalisation of suffering. Perhaps, since there is a certain antagonised polarity in the debate, it is important to point out here that this work does not follow a postmodern line, whatever that may be. Certainly it uses certain postmodern techniques which explore difference and the hidden. To this extent postmodernism is useful. In broader political terms it may be plausibly argued that it embodies an appropriation of the radical ideas of Marxists and Situationists by capitalism in an attempt to remove any grounds of resistance to that system. See, for example, Sadie Plant, *The Most Radical Gesture*, (London/New York, Routledge, 1992). For my own part, postmodernism comes under attack in the final chapter of this work.

impose one conception of the good on all individuals. Either way, the idea seems to be that the future, if not the present, will be resolved, free from conflict. The law as a body of rules is that which will structure us towards such a resolution.

Now there is much to say for such visions of future harmony. Conflict, at least in some senses, seems to be a condition that is by definition good to overcome, and certainly I would not want to write off in advance the possibility of resolving all conflict. But, as with many problems, it depends how you do it. What I argue in this thesis is that liberal theory's attempts to address conflict are themselves based on a need for conflict. The liberal's peaceful future, at least, is only a myth.

In this context, to turn to our second question, we can see why conflict might be a good thing. The grand idea of the harmonious future of the liberal or the socialist does not relish conflict. It is something to be overcome, contradicting as it does their ideas of the right. And yet if one disagrees with these visions of the political future conflict might indeed be a good thing. It is in this sense that the conflict produced by the CJPOA might be seen as positive. We live in a profoundly uncertain world. A product of this uncertainty is the realignment of our social spaces.²² The CJPOA is the government's attempt to respace its world, defining itself against the dirty, lazy travellers and non-property owners. In their turn this has produced a response from those affected by the Act, leading to particularly interesting moral and aesthetic respacings of their worlds. No doubt the world as harmonious would be a better place, but this leaves unanswered the question of whose harmony this world will enjoy.

²² Bauman, *Postmodern Ethics*, pp.229-230. This respacing of our social worlds is discussed in more detail in chapter seven.

Such reflections form something of a necessary background to the consequent discussion of the CJPOA as a conflict produced by liberal justice. There is something odd, of course, in referring to a piece of legislation as a conflict. For either it is an attempt to legislate on a conflict, to resolve it, or it is something that produces a conflict by creating a criminal opposition that was not previously there. My suggestion is that the two possibilities are rather closely linked. When I refer to the CJPOA as a conflict it is a convenient shorthand for this more convoluted point.

Liberal theory takes seriously the problem of conflict. John Rawls' later work has come to focus increasingly on the problem of stability in liberal societies. In his introduction to Political Liberalism Rawls states that the liberalism of this type has its basis in how seriously it takes the problem of conflict between various comprehensive, as opposed to political, doctrines.²³ He argues that his is a political philosophy that is not withdrawn from the world, but is really trying to address the practical conflicts that we all face. Its level of abstraction is 'a way of continuing public discussion when shared understandings of lesser generality have broken down.'²⁴ Galston suggests that an 'ever increasing social diversity' has produced in liberal political philosophy 'a renewed emphasis on the task of forging a meaningful and usable political unity.'²⁵ This diversity may be of many kinds - religious, ethnic, philosophical - involving goods which might not obviously seem well adapted to being limited by the liberal state. Rawls' idea of the 'overlapping consensus' as providing the necessary support for the liberal state will be considered in later chapters.

23 Rawls, Political Liberalism, (New York, Columbia University Press, 1993), p.xxvi.

24 *Ibid.*, pp.45-46. S.Mulhall and A.Swift, Liberals and Communitarians, (Oxford, Blackwell, 1992), p.182, suggest that the move to political liberalism is an attempt to make the conception of justice publicly justifiable to all members of society.

25 W. Galston, Liberal purposes, (Cambridge, Cambridge University Press, 1991), p.142.

As we shall see, we should not necessarily be bewitched by these good intentions. The immediate task here, however, is to suggest different ways of understanding, and approaching, the particular conflict in question, that of the CJPOA. It is important to be clear exactly how this conflict is to be approached in this work. It is instructive in this regard to consider in some detail a particular example of how potential conflict might threaten the stability of the liberal state.

A recent article by Will Kymlicka explores the problem of social unity in a liberal state with ethnic diversity. He comments that the identification of a model of social unity that can accommodate ethnic diversity should be one of the first tasks of political theory but is in fact one that has been under-addressed.²⁶ Kymlicka's article can help us see how the claims of these ethnic groups may be related to the liberal state. Again my intention is not to suggest what this relation actually might be, if such a thing were indeed possible, but rather to consider various options which raise possible points of interest for the liberal state.

Kymlicka identifies two kinds of ethnic diversity within the liberal state. Firstly, what he calls multinational diversity where there is more than one nation within the state, something which may have happened through consent or through conquest. Secondly, there is polyethnic diversity, the source of which is migration. It differs from the first in that its groupings do not constitute nations nor occupy homelands.²⁷

Now, polyethnic diversity presents little threat to the unity of the liberal state since its ethnic groupings have voluntarily come to an already pre-existing larger nation. Kymlicka suggests

²⁶ W.Kymlicka, 'Social unity in a liberal state', *Social Philosophy and Policy*, 13 (winter 1996), p.105.

²⁷ *Ibid.*, pp.106-115.

that the terms of this integration may be being challenged but not the fact of integration itself.²⁸

Multinational diversity raises much more profound problems, for if self-government for the ethnic groupings is accepted this means a dual citizenship and lack of shared public virtues which can bind the state together. If it isn't, accepting a common citizenship usually involves supporting the culture of the majority nation which in itself is likely to lead to increased violence and demands for secession.²⁹

Kymlicka argues that this choice of situations represents a crisis for the liberal state, which doesn't seem able to accommodate multinational ethnic diversity. He suggests that therefore the 'health and stability of a multiethnic democracy depends, not only on the justice of its "basic structure," but also on the qualities and attitudes of its citizens: e.g., their sense of identity, and how they view potentially competing forms of national, regional, ethnic, or religious identity; their ability to tolerate and work together with others who are different from themselves, their willingness to show self-restraint and to act from a sense of justice.³⁰ The problem is that the national groupings may share the same conception of justice but still this provides no guarantee of stability because their national identities are so different. The countries of Europe may all share the same basic conception of liberal justice but as is clear at the moment this is no guarantee of greater union between them. To return to Kymlicka's specific problem, he suggests that the answer to the problem of multinational states lies in the forging of a common identity, whilst acknowledging that any generalised answer to the question of how this might be done is unlikely.³¹ He argues that what is needed is a theory of 'deep diversity' which accommodates not only diversity but also 'a diversity of approaches to

²⁸ Ibid., p.118.

²⁹ Ibid., pp.124-25.

³⁰ Ibid., p.106. See also W.Galston, *Liberal purposes*, ch.10, for an account of the virtues needed for the citizen of a liberal state.

These points are returned to in the next chapter.

³¹ Kymlicka, 'Social unity in a liberal state', p.132.

diversity.³²

Now, the particularities and virtues of Kymlicka's proposed solution need not concern us here. What it does give us is two ways of articulating conflict in liberal societies. Importantly, neither of these two is the exact approach that I take.

(1) We may note how he treats the problem of multinational ethnic diversity as, at least in principle, addressable within the terms of liberalism. A shared conception of justice may not be enough on its own to guarantee social unity amongst the different ethnic identities (certain virtues may need to be encouraged) but at least there is a shared conception of justice.

(2) The issues that Kymlicka raises are complex, far more complex than it is possible to do justice to here. Certainly, however, without the shared conception of justice between the ethnic groups this would not be a conflict that might be addressed within the terms of liberalism. Defined exclusively by their own ethnic, and possibly other, identities, there might be no common ground for discussion with the liberal identity. Such a conflict would be between the liberal and the non-liberal.³³

The approach taken here does not align itself strictly to either of these scenarios of conflict. It is initially considered as a conflict between rights, that is claims that might be made within liberal justice. But, as we shall see, the rights of property might not allow for the rights of the

32 Ibid., p.134. He is sanguine enough to realise that allegiance to the state built on this deep diversity is 'the product of mutual solidarity, not a possible basis for it,' p.134

33 Examples of liberalism's accommodation, or otherwise, of the nonliberal may be seen in problems of religion and the state, such as the Rushdie case, and some forms of environmentalism, which as R.Dworkin, 'Liberalism', A Matter of Principle, (Oxford, Clarendon Press, 1986), p.202, points out refer to superior conceptions of the good life which liberals cannot appeal to.

groups targetted. If they do not, the claims of these groups as unvoiceable in liberal terms must be non-liberal claims. So the CJPOA as conflict is approached as one that might *possibly* be addressed within the bounds of liberal justice, as a conflict between the liberal and the liberal, but this approach is contingent. I do not start off with the assumption that the CJPOA can or cannot be dealt with by liberal justice; whether it can or cannot be comes out, initially, of an exploration of the targetted groups' demands with the rights of private property.

This conflict is explored through two different theories of private property within the liberal tradition, one libertarian, the other, for want of a better expression, welfare liberal. Both are stated as flexibly as possible so as to allow the greatest opportunity of accommodation with the hypothetical demands. That it is concluded that the conflict is not perhaps resolvable within liberal terms leads to the supposition that there is something illiberal about the targetted groups claims. But as later chapters of this thesis explore this is an illiberality that is in fact created by the liberal. Therefore the real problem that the CJPOA embodies is that it reveals the inevitability of such conflicts within liberal societies.

The point is an important one for it expresses the openness that I try to take towards liberal justice. I do not propose to condemn liberal justice from the outset for excluding certain claims as non-liberal. My angle may be better understood when put into the context of an outline of the structure of argument followed in this thesis.

3. An outline:

In exploring this problem of the CJPOA within an understanding of liberal justice this work

covers a broad theoretical ground, from property theory through to discussions of the liberal conception of the self to images of the country and city and a sense of place. However, this possible eclecticism need not be a source of confusion. Of more concern perhaps is how the argument moves between the applied and the theoretical. I have already said that my overall aim is to make an argument about liberal justice. In making this argument I use a particular example, the CJPOA. It is important to stress three points as regards this movement between the two.

Firstly, inevitably some distortion of this particular happens in the attempt to make the more general point. As stated earlier though I do not claim to give a broad sociological or legal reading of the CJPOA. Rather it is used in a somewhat selective fashion through which an argument may be conducted.

The second point is to do with the relation of this work to its political context. Of course the CJPOA is the legislative product of a particular government and any conclusions that I come to about liberal justice through exploration of it will be conclusions about this government. However, the points I want to make about liberal justice are broader than being limited to particular legislations. Certainly, they take in the recent change of government. Therefore, apart from chapter six where it serves a particular purpose, this work makes little reference to the specificities of British political life in the 1990s.

The third point bears on the what is perhaps rather unusual methodology that is used in the argument. This is a methodology in which the particular and applied and the general and the theoretical are consistently coming up against each other in ways that advance the argument. I

begin merely with a minimal account of liberal justice. The property theory of this system of justice is tested against the hypothetical demands. The confused conclusions to this test for their compatibility do give us an indication as to how we might understand liberal justice. This understanding is fed back into our reading of the CJPOA, which in turn develops new insights into liberal justice.

The arguments of this thesis therefore take the form of a gradual unravelling. Some structure to this process of disclosure may be given by outlining the main lines of argument that are followed, though the articulation of this structure may be slightly misleading since the arguments in the thesis arise so closely out of each other. Bearing this danger in mind, the six remaining chapters of the thesis may be divided into four sections: (1) a minimal account of liberal justice and two theories of rights that may structure this justice; (2) the testing of the compatibility between two theories of private property connected to these theories of rights against the hypothetical demands of the groups targetted by the CJPOA; (3) how their possible incompatibility may inform our account of liberal justice and how we may understand the CJPOA as liberal justice; (4) how conflicts such as the CJPOA might be avoided.

It is in chapter two that (1), the minimal account of liberal justice and the two theories of rights that may structure this justice, is given. This chapter is largely an expository chapter. This thesis needs some account of liberal justice in order to judge the compatibility of the hypothetical demands against it. On the other hand, our full understanding of liberal justice arises out of how it might deal with these hypothetical demands, so our initial account can be no more than minimal. This is not to say, however, that it is not controversial. Its location of the common core of theories of liberal justice in a certain conception of the self might seem to

exclude theories such as Hayek's. In its turn, as chapter four shows, this exclusion is in fact significant for our understanding of liberal justice. It is suggested that two theories of rights might be understood as structuring justice in a society justifiable to this conception of the self. The first is Hillel Steiner's version of the choice theory; the second is Joseph Raz's account of the interest theory. My intention is not to make either moral or political judgements upon the relative merits of these theories. Rather they are given in order to set up the context within which the two theories of property against which the hypothetical demands are tested might be understood.

Chapter three considers the compatibility of these theories of property with the hypothetical demands. Thus it deals with point (2) above. The libertarian theory, connected to the choice theory of rights, is explored at some length, largely through consideration of the work of Nozick, Narveson and Steiner. What I refer to as the welfare liberal theory of property, connected to the interest theory of property, is looked at much more briefly. The lengthy exposition of the libertarian theory allows us to see that it is not compatible with both of the hypothetical demands though it seems to be compatible with one. Discussion of the libertarian theory is left here for it has failed the full compatibility test which was set out as the intention of the exercise. Furthermore, since it was suggested in chapter two that differing versions of liberal justice may be linked by a common conception of the self of liberal justice, the arguments as regards welfare liberalism, which concern this self, may be equally applicable to the libertarian theory.

The welfare liberal theory of property, on the other hand, appears to be compatible with both demands. Our argument could be left rather uninterestingly here. If it is, we could conclude

that the CJPOA, in opposing these demands, does not at least embody liberal justice as welfare liberal justice. However, I suggest that we should not necessarily accept this conclusion. It is argued that liberal property theory may misrepresent, and therefore not be able to accommodate properly the demands of the targetted groups, and that it is through considering this possible process of exclusion of certain interests that we might understand how the perceived targetting of groups in the CJPOA is in fact typically liberal.

Now, these are only possibilities which are reached by the end of chapter three. It is the next three chapters which form argument (3) above. The possible conclusions in chapter three open up a possible reading of liberal justice which is eventually fed back into our understanding of the CJPOA. By the end of chapter six it might be concluded that the CJPOA is an example of both libertarian and welfare liberal justice. As said earlier, the focus here is on welfare liberalism since it raises the more immediate problems as regards the question of compatibility but the arguments may be applicable to libertarian theory.

Chapter four comes back to the self which chapter two posited as being at the basis of liberal justice. It explores the nature of this conception of self with particular focus on the work of Rawls. It argues that Rawls' conception of the self as reasonable and rational is one created through the exclusion of other possible conceptions of the self. This argument is conducted through a comparison with Hayek who has an apparently different conception of the self. I suggest that these differences are not as great as they may seem. Situated within the broader claim that Hayek is excluded from accounts of liberal jurisprudence, it is therefore arguable that Hayek's differences are created in order to confirm the rational and reasonable nature of the Rawlsian self.

We have then a possible understanding of the self of liberal justice constructed upon the exclusion of other conceptions of the self. Chapter five expands this analysis away from intra-liberal arguments to how the liberal conception of the self creates in opposition to itself its own non-liberal conceptions. This possibility is considered both as a broad process with the creation of the savage as being part of the liberal imperial project, and more specifically by looking at how the criminal, or he who is opposed to liberal principles of justice, is an integral part of Rawls' original position.

So we might understand the CJPOA as part of this process of the creation of opposition to the liberal, or conflict production. Chapter six returns to the CJPOA in some detail and through an analysis of the debates on the Act becoming law, finds support for this interpretation.

Furthermore, through some of the ideas of Foucault on the creation of criminality, it argues that the targetting of certain groups in the CJPOA is integral to the liberal production of opposition. With these new insights on liberal justice in general and the CJPOA in particular we return to the hypothetical demands. We may now understand them as incompatible with liberal justice. Therefore we may see the CJPOA as liberal justice.

It is important to note that these conclusions are not firm; they might be disputed. This lack of firmness is perhaps to do with the investigative nature of this work. Nevertheless, they are not uninteresting conclusions insofar as through them we might understand the CJPOA and liberal justice more broadly. The last section of chapter six applies some of the ideas that have been discussed in this analysis of the CJPOA to other areas of liberal justice.

The final chapter signals a change of direction. It is (4) above, a brief look at how conflicts

such as the CJPOA might be avoided. It is thus a move away from criticising liberal theory towards a more constructive approach as to how different ways of life may be organised together. In what is a hopelessly large task, it makes little headway except to suggest the arguments that might have to be explored. Its discussion of non-exclusive identities leads to the idea of public space in which these identities might co-exist. It is not clear how such a space can accommodate identities non-exclusively, therefore bringing us back to the problems of exclusion discussed in relation to liberal theory. What it does give us, though, is an understanding of how we might approach the CJPOA. It is argued that only through public spaces defined by public property rules may we avoid the kind of conflict we see in the CJPOA.

There is a kind of closure in this conclusion. It brings us back to the issue we began with, that of property. It does leave unanswered many of the questions that have been raised during the course of this work concerning the problems of liberal justice. Yet, all the same, it is some kind of conclusion: it may be part of an answer and at least the questions have been raised.

Chapter Two: Justice and Rights

Introduction:

The initial aim of this thesis, recall, is to compare the compatibility of the hypothetical demands of the groups targetted by the CJPOA with the demands of liberal justice. The results of this comparison will tell us something about liberal justice. It is important in this context to have some initial grasp of what is meant by liberal justice. This largely expository chapter introduces the idea.

Certainly, the idea of liberal justice has been discussed in the first chapter as if its meaning were clear. Here I attempt to suggest how it might be understood; not to give an exhaustive account of it, but rather to give an idea of the assumptions that this thesis is working from. This understanding of liberal justice is not intended to be extensive. Our understanding of it will be filled out in later chapters. The account here is limited to three specific aims: (1) to articulate a certain conception of the self or person which lies at the basis of this kind of justice. The significance of this conception of the self will become properly apparent in chapters four, five and six of the thesis. In the present context it serves as a way of unifying the idea of liberal justice as something to be addressed. (2) To explore two different theories of rights, the choice and the interest theories, which give two different accounts of liberal justice. (3) To suggest what the different rights to property as part of these different accounts of justice might mean. Conclusions on these points set up the important question for the next chapter: the extent of the possible compatibility of liberal justice with the hypothetical demands given in chapter one.

Central to this argument is the connection between private property and liberalism, a connection which clearly needs establishing, since my suggestion is that the CJPOA as a dispute over property is more broadly a dispute about liberal principles of justice. In part, it is this connection that the rest of this chapter and the next explore. Importantly, it is not a relation which may be conceived of only in one way. For the libertarian the connection between liberalism and private property is very tight; property is a less important category for the welfare liberal. However, private property is not exclusive to liberalism. One can endorse it without being a liberal. Hegel's theory of private property provides just one example of a non-liberal account of private property; it is considered briefly in the concluding chapter. On the other hand some notion of private property is essential to liberalism. As we shall see it is closely connected, to one degree or another, to the liberal individual's ability to choose between conceptions of the good life.¹

1. The self of liberal justice

As indicated in the introduction to this chapter, it is part of my argument that there are different conceptions of liberal justice, structured by different theories of rights, which lead to different theories of property and different ways of approaching the CJPOA. However, I also argue that there are points of common ground which allow us to call both arguments liberal. The establishment of this common ground is important for two reasons. (1) In this chapter and the next it allows us to conceive of some coherent body of theory that is being addressed; (2) in its articulation of a particular conception of the self as this common ground, it uncovers the

¹ It is possible that a liberal society would not contain any private property at all if all its members contracted away their property rights into collectives. Yet such a contracting away would depend initially on private ownership; it would be an expression of the individual's choice of the good life.

central focus of the attack on liberal justice that takes place in later chapters. It is (1) rather than (2) which is of immediate importance here.

It is a task the results of which are bound to be open to disagreement. Waldron comments that a common core to positions that describe themselves as liberal does not exist. Instead their relationship is one of 'family resemblance', an issue over which all families of course disagree. Furthermore in liberalism's similarities and differences with conservatism and socialism 'we are dealing not only with cases of "family resemblance", but with resemblance and difference in the context of three (or more) great families which, though rivals, have engaged over the centuries in extensive intermarriage and alliance'.² In such a confused situation any account, especially a brief one, of liberal justice is bound to be selective. Certainly the common ground that I explore is not ground that it is immediately apparent that Hayek for one would share. But, as we shall see in the second half of the thesis, Hayek's supposed differences are perhaps more significant than any possible similarities.

Ronald Dworkin argues that 'a certain conception of equality...is the nerve of liberalism'.³ He suggests that for a government to treat its citizens equally means one of two things: (1) the government must be neutral on questions of the good; (2) the government must have a theory of the good in order to treat its citizens equally. Liberalism, it is argued, is defined by (1).⁴

An account of liberalism as embodying a certain conception of equality through a neutrality as

2 J. Waldron, 'Theoretical foundations of liberalism', *Liberal Rights*, ed. J. Waldron (Cambridge, Cambridge University Press, 1993), p.36.

3 Dworkin, 'Liberalism', p.183.

4 Dworkin, 'Liberalism', pp.191-92. It is important to note that this neutrality is not based on moral scepticism as to what the good may be but on the equal concern and respect that each person and their pursuit of the good is owed. The thorny question of the liberal's avowed neutrality is returned to in chapter four.

regards questions of the good has the advantage of not involving a controversial notion of equality which, for example, Dworkin and Nozick would disagree on. For Nozick the free-market as the expression of individual preferences may preserve equality whilst for Dworkin differences in talents, abilities can result in differences in distribution which can affect equality. Equality as neutrality, though by no means complete as a theory of equality, does in this context serve to straddle both wings of liberalism.

However, the matter is not quite so simple, for there are liberals who deny that the state should be neutral as regards conceptions of the good, and that in fact the liberal state needs to promote certain conceptions of the good if it is to survive. Galston argues that just because liberalism was born out of a fear of tyrannical authority this is no reason for it to stay there, caught in its own doubts.⁵ He presents a set of virtues that liberalism needs to foster if it is to survive.⁶ Similarly, Raz's conception of well-being allows the liberal state to promote certain ways of life above others in ways that we will consider in more detail in the next section.⁷

It might be suggested at this point that we simply have liberal family members with various overlapping features but no core features. But to stop with Wittgenstein⁸ here would be to miss what it is of significance that they do share. For on a deeper level what links these perfectionist (the state needs to promote certain goods) and anti-perfectionist (the state should remain neutral between goods) forms of liberalism, is a conception of the subject of liberalism

⁵ Galston, *Liberal purposes*, p.12. It is interesting, though beyond the bounds of this present work to consider, that he suggests (p.6) that America's, and one might also say Britain's, social problems are directly linked to its not providing conditions for a healthy liberalism. For the argument developed in the course of this work is that certain social problems, at least, are a direct consequence of liberalism, not a product of its not being attended to closely enough.

⁶ *Ibid.*, ch.10.

⁷ See J.Raz, *The Morality of Freedom*, (Oxford, Oxford University Press, 1986), in particular ch.12.

⁸ L.Wittgenstein, *Philosophical Investigations*, trans. G.E.M.Anscombe (Oxford, Basil Blackwell, 1968), ss.66-67.

Wittgenstein's argument is that the various objects denoted by a concept may not have any common properties but rather possess overlapping features in a network akin to family resemblances.

as autonomous.⁹ The idea of autonomy is, of course, hardly a transparent one.¹⁰ And certainly how it is to be achieved and preserved is not a matter of agreement. For Rawls autonomy is preserved by an anti-perfectionist state; for Raz it requires a perfectionist state.¹¹ Nevertheless, what is shared is that as an autonomous subject the liberal subject is able to rationally pursue and review conceptions of the good life. Thus we can understand Dworkin's account of liberalism given above as essentially protecting and promoting this subject. Furthermore, this situating of liberalism in a certain conception of subject can also accommodate, and make clearer, broader characterisations of liberalism.

John Gray asserts that 'For all its historical variability, liberalism remains an integral outlook, whose principal components are not hard to specify, rather than a loose association of movements and outlooks among which family resemblances may be described.'¹² These principal components Gray specifies as (1) individualism, (2) egalitarianism, (3) universalism, (4) meliorism.¹³ The subject as autonomous rational chooser can be found in all these components. It is because the individual is conceived as able to rationally pursue her own conception of the good that the claims of the individual need to be protected against any collectivity. It is because we are all rational autonomous agents that we are all equal in this sense. A universalism clearly follows from this equality. Finally the ever present possibility of meliorating social arrangements flows directly from a conception of the subject whom those arrangements are designed to serve and whose conception of those arrangements is open to

⁹ It may be plausibly argued that the distinction between perfectionist and anti-perfectionist liberalism is less than clear, and that in fact anti-perfectionist liberalism is based upon controversial conceptions of the good. Though this argument is not followed specifically here, it is implicit in discussion of the subject of liberal justice in chapter five.

¹⁰ See R.Lindley, *Autonomy*, (Basingstoke/London, Macmillan, 1986), ch. 1.

¹¹ See Mulhall and Swift, *Liberals and Communitarians*, (Oxford, Basil Blackwell, 1992), p.253, for an outline of these differences.

¹² J.Gray, *Liberalism*, (Milton Keynes, Open University Press, 1986), p.xi.

¹³ *Ibid*, p.x.

change.

Waldron suggests that liberalism rests upon a certain view of the justification of social arrangements: 'liberals are committed to a conception of freedom and of respect for the capacity and agency of individual men and women, and that these commitments generate a requirement that all aspects of the social world should either be made acceptable or be capable of being made acceptable to every last individual.'¹⁴ It is because the subject of liberalism is autonomous, able to rationally pursue and review conceptions of the good, that these social arrangements need to be made justifiable.

The problematic implications of this liberal subject will be explored at length in chapters four and five of this thesis with particular focus on the work of Rawls. At the moment it should just be seen as a minimal conception. It is a central aspect in our investigation of the compatibility of the hypothetical demands and welfare liberalism. As stated earlier, it is introduced at this point as the basis of a coherent notion of liberal justice, stretching from the libertarian to the welfare liberal. It is, however, less interesting as part of an exploration of the compatibility of libertarianism with the hypothetical demands; chapter three argues that there are enough difficulties in a libertarian compatibility with these demands, without having to resort to the lengthier argument on the liberal self.

It should be clear for the moment how this self leads to a liberal conception of justice. If human life is characterised by an irreducible diversity of goods pursued rationally and open to review then justice is that which allows such diversity to live together. However, this

¹⁴ Waldron, 'Theoretical Foundations of Liberalism', pp.36-7.

characterisation is still sufficiently flexible to lead to different accounts of liberal justice.

Autonomy is closely connected to freedom. Lindley suggests that there are two dimensions to the autonomous self: (1) a 'developed self, to which one's actions can be ascribed' and (2) 'freedom from external constraints'.¹⁵ Now depending on which of these is emphasised we get a different set of individual rights and a different account of justice that these rights structure.

The libertarian emphasises the latter, or so-called negative freedom. This emphasis does raise the question of whether libertarians do value autonomy. However, if it is argued that they do not, it is very hard to see what underwrites the importance that is attached to the need for freedom from external constraints if it is not the value of an agent determining her own life.

Assuming this negative conception of autonomy a set of negative rights results, rights not to be interfered with rather than rights to a certain good. Justice here is about how the restrictions on our freedom may be arranged, with rights as the, what Steiner calls, 'elementary particles' which articulate this justice.¹⁶

Other liberals emphasise both aspects of autonomy. Therefore it is not simply enough for external constraints to be absent; the autonomous agent must also possess the ability or power to do a certain act to be free to do it. To quote a favourite example from the literature on the subject: the beggar is not as free to go to the Ritz for dinner as the business person, although both may be equally unconstrained from going, since the beggar does not possess the power, in terms of money, to go.¹⁷ This fuller conception of autonomy leads to a larger set of rights,

¹⁵ Lindley, *Autonomy*, p.6.

¹⁶ H.Steiner, *An Essay on Rights*, (Oxford and Cambridge, Mass., Blackwell, 1994), p.2.

¹⁷ The debate over freedom is a fraught, and frustrating, one which I have no intention of engaging in, except to point out in the broadest terms possible what some of the positions are, since it is a debate which underlies the different sets of rights as discussed in the next section. For what he calls a pure negative conception of liberty, an empirical, unmoralised account, see Steiner, *An Essay on Rights*, ch.2. R.Flathman, *Philosophy and Politics of Freedom*, (Chicago, University of Chicago Press, 1987), ch.2, criticises Steiner and provides what he calls an impure negative conception of freedom. But his

possibly involving rights to certain goods as providing the capacities necessary for this expanded account of autonomy.

2. Choice or interest rights?

Different theories of rights may account for these different emphases on autonomy and different sets of rights in consequence. It is important to give a reasonably detailed account of two of these theories since they offer contrasting positions on the possible compatibility of their overall set of rights.

To say that X has a right to Y means typically that X has a claim to Y which some entity, Z, has a duty to provide in whatever sense is relevant. Such a right entails a duty.¹⁸ So X has a right to Y involves three distinct elements: the claimant (X), the claim (Y), and the addressee or duty-bearer (Z). Now, the nature of and relationships between these three elements might be discussed at length. What I wish to focus on for the purpose in hand is the relation between

argument that although capacity for action is necessary for freedom it is not part of the evaluation of freedom seems an unsatisfactory halfway house. The conception of freedom associated with the interest theory of rights in the next section is one in which capacity and non-interference are both part of the evaluation of freedom. It seems to me that one of the more sensible comments on freedom has come from Waldron, 'Theoretical foundations of liberalism', p.39, who is surprised only by people's unwillingness to accept as possible other people's accounts. After all, Liberty is a concept which captures what is distinctive and important in human agency as such and in the untrammelled exercise of powers of deliberation, choice, and the intentional initiation of action. Surely no one can believe that what this *is* is something simple or self-evident, or that there can never be honest disagreements in this area. Human agency, will, and the initiation of action is a profoundly complicated business: it is the locus of one of the most intractable problems in metaphysics, and is also the source of some of the deepest exultation and despair in human experience.'

18 W.Hohfeld, 'Some fundamental legal conceptions as applied in judicial reasoning', *Yale Law Journal*, 23 (1913-14), makes clear that rights may not be limited to claims, but may also be privileges, powers or immunities. Importantly rights are often clusters of these meanings. Thus the right to freedom of speech involves both the privilege of free speech, insofar as one doesn't have duty not to exercise it, and the claim against interference from other people in the exercise of this freedom. J. J. Thomson, *The Realm of Rights*, (Cambridge, Mass., Harvard University Press, 1990), pp.53-55, notes a confusion here in Hohfeld's equating of privileges and liberties, arguing that a liberty is a cluster-right which has a guarantee of non-interference; it is both a privilege and a claim entailing a duty. We come back to liberties in subsequent discussion of Steiner's theory. Further, it is worth noting that talk about the correlation of rights and duties is misleading if it is taken to mean that rights talk can be analysed into talk about duties. As Waldron argues, *The Right to Private Property*, (Oxford, Oxford University Press, 1988), p.84, the two cannot be strictly equivalent since then rights could not stand as a justification for duties, as they do in Raz's interest theory. Similarly, in the choice theory rights are defined by their being exercisable; it is in the right-holder's power whether she activates the duty entailed by her right or not.

X and Z: on what grounds may X constrain the action of Z through imposing a duty on her?

For different accounts of this relation give very different sets of rights and different ways in which possible conflicts between rights can be settled.

The aim is to draw a broad distinction between the choice theory and the interest theory of rights. Obviously choices and interests must be logically independent of each other if the distinction is not to be a trivial one - it might be argued, for example, that choices collapse into interests.¹⁹ Assuming this distinction leads to two significant conclusions. Firstly, the possibility or otherwise of a compossible set of rights and secondly, following from this possibility, the nature of the right to property contained within this set. With this framework in place we can consider how liberal justice might accommodate the demands of the targetted groups.

2.1 The choice theory of rights

My focus for the first part of this discussion, on the choice theory, and for the subsequent exploration of the libertarian theory of property, Hillel Steiner's, An Essay on Rights, needs some explanation. His is a libertarianism with profound redistributive implications, thus giving this wing of liberalism its best chance, as my aim stated in the introduction, to come to some sort of accommodation with the demands of the groups targetted by the CJPOA.

The basic claim of the choice theory is straightforward. Steiner says that 'a right exists when the necessary and sufficient condition, of imposing or relaxing the constraint on some other

¹⁹ Steiner, An Essay on Rights, p.58. It does seem possible to argue that rights perform both functions, a view put forward by J.Nickel, Making Sense of Human Rights, (Berkeley/Los Angeles/London, University of California Press, 1987), pp.22-23.

person's conduct, is another person's choice to that effect.²⁰ The claimant is specified by the control that she has over the duty-bearer. It is in her control whether she constrains the action of another by imposing a duty on her or not. In other words it is definitive of a right that it is exercisable.

As will be seen in a moment it is on this question of exercisability that the choice theory differs from the interest theory. For now it is worth noting that it is not at all clear that all our rights are exercisable. For example our rights in criminal law are rights that we have whether we choose to exercise them or not. We cannot waive our right not to be attacked. Other people have a duty not to attack me whether I have consented to it or not.²¹

However, let's assume, along with Steiner, that all rights are exercisable and the choice theory is correct. How does this assumption connect with the compossibility of a set of rights, for Steiner argues that for any set of rights to be a valid set it must be a compossible set? 'The linch-pin of this essay's argument is that the mutual consistency - or *compossibility* - of all the rights in a proposed set of rights is at least a necessary condition of that set being a possible one'.²² For if the set is not compossible we come up against what he calls 'the nightmare', appealing to something outside the principles of justice that generate this set of rights when two of them yield contradictory judgements over what to do in a particular case.

20 H. Steiner, *An Essay on Rights*, pp.57-8.

21 Certainly, it seems that the interest theory is better able to accommodate such rights, since it could be forcefully argued that such rights are in our general interests even if not in our particular interests. These issues will be explored in a moment. Steiner, *An Essay on Rights*, pp.65-73, does attempt to solve this problem of apparently unwaivable rights for the choice theory by situating the condition of waivability in state officials. It doesn't seem necessary to decide on the merits of his argument since my aim here is not to decide between the choice and interest theories but rather to see where they might take us.

22 *Ibid.*, p.2

Rights as rights in the choice theory prescribe what Steiner calls interpersonal distributions of pure negative freedom. This rather frightening expression points to two sorts of freedom: (1) the freedom to enforce the duties of others; (2) freedom as liberties involving a lack of a duty not to do certain acts.²³ The first type of freedom seems fairly clear; thus I have the choice whether or not I enforce the duty someone else owes me. The second needs more explanation as to how it fits in with a set of rights. Thus I am at liberty to take the train to London tonight insofar as I don't have a duty not to. On the other hand, no-one has a duty not to stop me getting the train. Therefore if someone else got the last seat on the train I would have no claim against them. This type of liberty Steiner calls naked; a set of rights, however, confers vested liberties, liberties which are protected by a 'protective perimeter' provided by duties entailed by other rights that I do have.²⁴

This conception of rights is connected to compossibility through the elucidation of duties. If one is subject to impossible duties then the set of rights is impossible. For someone to have a duty is for them to have the liberty to do that thing and *also* the lack of the liberty not to do it.²⁵ But as we have seen liberties may be naked or vested. And if they are naked they may be permissibly obstructed. Therefore for the duty not to be obstructed it must be a vested liberty. In other words the vesting of liberties means that one lacks the liberty not to do one's duty as well as having the liberty to do it. In effect then duty-holders must also be rights-holders in order to suitably vest their liberties.²⁶ Thus we see the emergence of what Steiner refers to as a 'densely webbed structure of serially implied perimeters' in which A's right to B from C involves C having rights to D not to interfere in his doing whatever is necessary for A

²³ Ibid., p.74

²⁴ Ibid., pp.74-76

²⁵ Ibid., p.79. This notion of a duty as a liberty is, it might be argued somewhere else, a somewhat peculiar one, and is produced by Steiner's conception of freedom as pure negative freedom.

²⁶ Ibid, pp.89-90

to have B and so on.²⁷

So much for the structure of compossibility. As interesting in the present context is the sort of rights that must constitute it. Steiner suggests that two actions are impossible if their extensional descriptions overlap, with the freedom to do an action being the actual and subjunctive possession of things.²⁸ Thus I am not free to take the train to London if you take the last seat; the extensional descriptions of our action both include the last seat. But if my taking the train to London was not just a whim but because I had promised to meet someone for dinner I would have a duty to get to London. To vest my liberty to get to London, and also my lack of a liberty not to get to London, I would have to have a right against people to their not having 'simultaneous possession' of the physical components of my action. In other words, and at least, I would have to book a seat.²⁹

Compossibility might therefore be interpreted as taking place within a set of property rights. Such a conclusion might seem interesting in terms of our discussion of the CJPOA, which is on our interpretation a dispute over property rights. Might a compossible set of property rights allow for the articulation of the demands of the targetted groups? This question can only be fully answered after the libertarian theory of property has been explored. For now it is important to note that compossibility also demands a diachronic dimension as well as a synchronic one. This history, as Steiner points out, is simply a consequence of the conceptual fact, already established, that rights are exercisable.³⁰ One's title to an object necessary for an action must be vindicable; its vindication implies previously vindicable titles from which it

27 Ibid., p.90

28 Ibid., p.41. Also see in general Steiner's discussion of freedom in ch.3

29 Ibid., p.91

30 Ibid., p.103

derives. Historical compossibility ensures that no more than one person has the title to a certain thing at any one time.³¹

This historical dimension indicates a particular way of conceiving the right to property. It is opposed to patterned or end-state theories of property distribution, which ignore the historical aspect, and which posit some reason, or interest, why this pattern should be fulfilled. It is concerned with how things have come about rather than how they are. Therefore it *might* not be open for people without property rights, such as the groups targetted by the CJPOA, to demand rights off people who have. In historical entitlement terms this might simply be injustice. The *might* is important, however, for these chains of historically vindicable property rights must come to an end somewhere. This end is our original rights,³² and depending on how we conceive the rules constituting these original rights some redistribution of the historical product might be in place if these original rights have in some way or other been abused.

This appeal to original property rights embodies one of four conceptions of the right to property as given by Waldron.³³ It points to some rights that we have in a state of nature. He gives as another possible meaning the right against expropriation. This sense of the right is contained in the UN Declaration of Human Rights (art.17 which says that 'No-one shall be arbitrarily deprived of his property') and the European Convention on Human Rights (art.1 of Protocol 1 which says that 'Every natural or legal person is entitled to peaceful enjoyment of his possessions').³⁴ The articulation that I am attempting lies somewhere in between these two

³¹ Ibid., p.103

³² Ibid., p.228

³³ Waldron The Right to Private Property, pp.17-24.

³⁴ For an interesting discussion on how debates in the Council of Europe have come to define the right to property in this narrow fashion see L.Sermet, The European Convention on Human Rights and Property Rights (Strasbourg, Council of

meanings. Certainly it involves natural property rights but it is how these are manifested that is important. It is in this sense that the libertarian sense of the right to property is captured by a right against expropriation. Property is important only insofar as you have it. As a right it cannot be appealed to if you don't have it. Obviously, and as Waldron argues, this is hardly an argument for private property but an assumption of it, which brings us back to natural rights as providing the necessary justificatory force.

These original rights clearly need some more investigation. This will take place at length in the next section. First let's note the price of this compossibility and compare it to the set of rights likely under the interest theory of rights. Its costs should be obvious and have already been hinted at. Certainly, it may not be a matter of justice whether the homeless are sleeping on the streets. They may have no right to the property of others which is vindicable through a historical series of transfers originating in some act of original acquisition.³⁵ The interest theory may hold otherwise.

2.2 The interest theory of rights:

This theory involves a different justificatory relationship between the right-holder and the duty-bearer to the choice theory. According to Joseph Raz, it holds that someone has a right if, subject to conflicting considerations, an aspect of his 'well-being (his interest) is sufficient

Europe Press, 1992). For references to human rights' treaties see Human Rights in International Law, (Strasbourg, Council of Europe Press, 1992).

35 J. Waldron, 'Rights in conflict', Liberal Rights, (Cambridge, Cambridge University Press, 1993), p.204, argues against Nozick, though the point is similarly relevant here, that 'the price for this tidiness is a severe limitation on the types of moral concern that can be articulated in the Nozickian framework.' Of course even in a Nozickian world rights do not define the limits of moral concern but insofar as they mediate our conception of justice we should at least be worried that they might be narrowly rather than broadly interpreted.

to hold some other person(s) to be under a duty'.³⁶ This interest stands in the form of a justificatory relationship to the duty. Not all rights are based directly on interests. Derivative rights are based on core rights. Thus my right to smoke is not grounded in my interest in doing so, but rather in my interest in doing as I wish, on which my right to freedom is based.³⁷ Of course interests here do not refer just to a matter of individual preference. One can be interested in something which isn't in one's interests and vice-versa. Thus what is in one's interests seems to appeal to some objective external standard.³⁸

Nevertheless, this still leaves flexibility as to what is to count as an interest sufficient to constrain the action of another through the imposition of a duty. Certainly though, it seems possible that an interest theory of rights could lead to a different set of claims to a choice-based theory. Raz provides one way in which this might work.

Raz argues that well-being, or interests (Raz sees the two as 'roughly coextensive'),³⁹ is connected not to one's personal beliefs but to the reasons behind these. In effect one can be mistaken about one's own well-being. For example someone's reason for going to university may be to get a job. It is the goal which describes her well-being. If, however, a degree makes no difference to getting a job, then it makes no difference, in terms of her well-being, if she goes to university or not.⁴⁰ Well-being is further de-individualised through its dependence on social forms. As it depends on success in one's chosen goals and these goals depend on the

36 Raz, *The Morality of Freedom*, p.166

37 *Ibid.*, p.169. The example also reveals how conflicting considerations might serve to outweigh a right. My right to smoke might, certainly in some circumstances, be outweighed by considerations of other people's health. How such conflicts might be structured, very relevant in terms of the discussion in hand, is explored at the end of chapter three.

38 See Raz, *The Morality of Freedom*, ch.12, and R.Plant, *Modern Political Thought*, (Oxford, Blackwell, 1991), pp.195-196, for a discussion of these problems. Clearly how we define interests is central to the particular set of rights that we get. Fortunately, the aim here is only to suggest the general direction such an argument for rights might lead us, rather than to posit a definitive set of rights linked to certain interests.

39 Raz, *The Morality of Freedom*, p.295

40 *Ibid.*, p.301

existence of social forms (one can't be a doctor without the institution of medicine) then the source of the value of the individual's life is in fact, or at least in part, communal.⁴¹

Now for Raz rights are 'typically intermediate conclusions in arguments from ultimate values to duties.'⁴² We may not agree about what our well-being ultimately is, but we may be able to agree about what rights we should have; thus a common culture is possible. Rights are bound up with pre-existing collective goods. Raz's liberalism is distinctive here, for rather than opposing rights to the collective good, they have their basis in this good. Thus the early emphasis in natural rights theory on the freedom of religion depended on the public good that religion served. Similarly the right to freedom of speech cannot be easily separated from its role in the protection of the general interest in the preservation of a democratic society. It is thus of benefit to the whole of society; the protection of the individual dissident is not its primary role.⁴³ So fundamental moral rights are either an 'element in the protection of certain collective goods, or their value is found to depend on the existence of certain collective goods.'⁴⁴

On the one hand, this connection between rights and collective goods might help deflect a criticism of the interest theory. Steiner for one raises the problem of third-party beneficiaries.

X may have a right that Y do Z, though it is in fact W who will benefit from the doing of Z.⁴⁵

Where then the interest theory, since interests and rights seem quite distinct from each other.

41 It is here that we see Raz's perfectionism. Autonomy requires not only the presence of options but acceptable options. Thus the state is justified in providing these options; The Morality of Freedom, pp.204-07. Mulhall and Swift, Liberals and Communitarians, pp.276-77, question Raz's empirical claim that state intervention is necessary to provide these options, arguing that if people only need an adequate range of options to sustain autonomy (and if only some forms of life require state intervention), then it is not clear that state action is required to guarantee this adequate range of options.

42 Raz, The Morality of Freedom, p.181

43 Ibid., pp.252-54

44 Ibid., p.254. To what extent this stress on the collective good makes Raz's support for rights consequentialist is an important question, though one that need not detain us here.

45 See Steiner, An Essay on Rights, pp. 62-64, for a discussion of this problem.

What this criticism assumes, of course, is that the right should be grounded in a particular interest; rather the right is generated by the general interest that we might have in our contractual arrangements being met.

On the other hand, we can see how it might lead to a sophisticated conception of rights to positive assistance. Such duties might of course be generated by any account of interests. Raz's developed conception of autonomy might demand a set of positive rights to protect and promote it. We have already noted earlier in this chapter the possible duty incumbent on the state to provide the range of valuable life options necessary for this autonomy. But there is also possibly a more interesting line of argument to be found in Raz. For the exercise of these rights depends on certain collective goods being in place. And they are there since they are not based on the individual interest but on the general interest in them being there. This allows for a possible conception of rights which doesn't depend simply upon duties of non-interference but of positive assistance as well. Or in other words it allows for the possibility of positive as well as negative rights.

The choice theory in contrast seems to be able to offer only a set of negative rights, that is rights which are defined by a duty of non-interference, which might lead to a problem for such an account of rights. Take X's right to free speech. Under the choice theory model, X has a claim to this freedom and the power to exercise it if she wishes. Correspondingly, Z's action is constrained according to X's choice. The important player then is X who by claiming her right forces a duty upon Z. If this is only a duty of non-interference there would be no problem in Z fulfilling it. If it was a duty of positive assistance as well it is not clear that Z would

automatically be able to provide this assistance purely according to X's choice.⁴⁶

It could be argued that the institutions which provide for and protect X's freedom of speech simply cannot be linked to X's choice to activate her claim. Therefore there is something wrong with the choice theory of rights. However, my intention here is not to adjudicate between the two theories but merely to set them out briefly with the set of rights that they would entail.⁴⁷

Back to what is our main concern here - property. The interest theory could point to the right to property interpreted both negatively and positively, if we want to accept the validity of the distinction. Negatively, it might be the right to be part of a property-owning class.⁴⁸ This conception of the right may be regarded as the right to have the opportunity to have property. Therefore no-one should be excluded from the property-owning class. It appears to point to a general interest we have in being in a position to have property. For Rawls the opportunity to have (personal) property is one of the basic liberties that would be decided on in the original position.

46 Of course the choice theory could involve positive duties if these were contracted upon. This point will be considered further in the discussion of original rights which are not a matter of contract.

47 It is argued by many that the distinction between positive and negative rights is a misconceived one. See for example J. Donnelly, Universal Human Rights in Theory and Practice, (London/Ithaca, Cornell University Press, 1989), ch.2; F. Jhabvala, 'On Human Rights and their Socio-Economic Context', Netherlands International Law Review, 31 (1984); H. Shue, Basic Rights, (Princeton, Princeton University Press, 1980), ch.2; O. O'Neill, Faces of Hunger: An Essay on Poverty, Justice and Development, (London, Allen and Unwin, 1986), ch.6. The argument is essentially that all rights need for their fulfilment both duties of action and omission. The argument that civil and political rights are negative rights and therefore the only real rights has its basis in the fact that these rights didn't take much action to implement in western liberal societies which already had the institutional structure providing for these rights in place. For countries without this structure they are both positive and negative rights. Along these lines, much argument has been directed against the UN's division of human rights provisions into two covenants, one dealing with civil and political rights, the other with social and economic rights. The former has duties of immediate enforcement, since they are seen as involving only duties of non-interference, whilst the latter have no duties of enforcement but form more of a promotional convention. Contrast with African Charter of Human and People's Rights which applies the same process to all rights.

48 This conception of the right is also recognised in the UDHR art.17, which says further that 'Everyone has the right to own property alone as well as in association with others.' Waldron, The Right to Private Property, p.390, comments rather scathingly on this interpretation of the right: 'A right like this has the immense advantage that it enables us to congratulate a capitalist society for protecting and upholding property as a universal human right, even though many or most of the members of that society are in fact the owners of little or nothing.'

Positively, a general interest in the actual having of property might be asserted. Hegel would argue for such a position though his theory of self-development, which the having of property is essential for, is particularly non-liberal in proposing a certain good for people. The Lockean proviso, variously interpreted by libertarians, might be one way of seeing this conception of the right. Rawls' difference principle again might be seen as guaranteeing a general right to property.⁴⁹ More forcefully it might be argued that the having of property either serves an important interest in itself or is vital in the funding of other rights.

The groups targetted by the CJPOA might see space for their demands to be articulated within some account of general interests. Even if it could be argued that there was some interest to justify the rights of private landowners, these rights do not proscribe the possibility of some interest that might justify the rights of the targetted groups. Nor need these rights be property rights. Whether they are or not in the present context is considered in the next chapter. If they are, the threat of an impossible set of rights arises with rights over the same piece of land. Steiner's nightmare returns, possibly.

Conclusion:

The framework has now been established for an exploration of our initial aim: the compatibility of the hypothetical demands of the targetted groups with the liberal defence of private property. The exploration is not, however, a simple one. Finding an answer to its purpose leads us into a consideration of liberal justice in general.

⁴⁹ Hegel's theory of property is considered briefly in chapter seven. Locke and Rawls are looked at more closely in chapter three.

Looking ahead, we return to this possible nightmare alluded to above towards the end of the next chapter. It shall be argued that the compatibility of the hypothetical demands and the interest theory of property does constitute something of a nightmare for welfare liberalism as liberal justice, though not quite in the way that Steiner means it. The problematic implications of the relation between the hypothetical demands of the groups targetted by the CJPOA and this theory of property are then explored subsequently in the context of the self of liberal justice that has been put forward in this chapter.

This relation, and its consequences, is one strand of the argument that is followed in the next chapter and has been set up by this chapter. The other is the relation between the libertarian theory of property, connected to the choice theory of rights, and the hypothetical demands. It is this relation which is dealt with at length in chapter three. As we shall see, the incompatibility in this relation is such that we may justifiably leave libertarianism as opposed to the targetted groups demands, or at least one of them.

Chapter Three: A Liberal Attempt to Solve the Problem

Introduction:

The previous chapter has established the framework within which we might judge the compatibility of the demands of the groups targetted by the CJPOA with liberal justice. In particular it put forward two theories of rights through which this justice might be structured, the choice and interest theories of rights. This chapter considers two approaches to private property within the context of these two theories. Their compatibility with the hypothetical demands will be tested, and in consequence certain conclusions drawn on the status of the CJPOA as liberal justice.

It is a long and important chapter. Its conclusions are hardly firm; it is in exploring these conclusions that much of the rest of the thesis is involved. It should be noted that what is not offered in discussing these two theories of property is a consideration of whether private property is justified, though inevitably some questions are raised in this direction.¹ The question of justification is of course a central one since if a certain theory of property is accepted as valid then certain claims may be ruled as outside justice without qualms. However, the intention here is to take two theories of private property and assess their compatibility with the hypothetical demands. In this sense it is these demands which play the critical role in assessing these theories of property.

¹ There have been several accounts of the justification of private property in recent years. For example, see L.Becker, Property Rights: Philosophic Foundations, (London, Routledge and Kegan Paul, 1977); A.Carter, The Philosophical Foundations of Property Rights; J.Waldron, The Right to Private Property; S.Munzer, A Theory of Property (Cambridge/New York/Melbourne, Cambridge University Press, 1990).

The approach to the two theories is both general and specific, therefore taking into account the peculiarities that discussion of private property in land raises.² That is, I initially consider property in general, rather than property in particular things, except where it seems relevant to do so. The specificity of property in land is examined in the last section where the compatibility of the hypothetical demands with the two theories of property is explored. In this move from the general to the specific I follow a distinction made by Becker between general justifications of property, which ask whether there should be property rights at all, to specific and particular justifications which ask what these rights should be and who should have them.³

Exploration of the libertarian theory, linked to the choice theory, forms the greater part of the chapter for its emphasis on compossibility would seem to be just what we are looking for as a way towards structuring a resolution to the conflict under consideration. However, this compossibility, as we shall see, comes at a cost. Problems with the libertarian theory give us reason to turn to an interest theory of property. These problems also importantly inform us on this theory. The interest theory of property, linked to welfare liberalism, is presented more schematically, and deliberately flexibly.

The final section of the chapter assesses the possible compatibility of these theories of property with our hypothetical demands. Libertarian property rights cannot accommodate both demands. It is thus put to one side. Nevertheless, the problems with it allow us to see

² Some of these peculiarities are discussed later in this chapter. For more detailed treatment see, for example, U. Vogel, 'When the Earth Belonged to All: the Land Question in Eighteenth Century Justifications of Private Property', *Political Studies*, XXXVI (1988), and Becker, *Property Rights: Philosophic Foundations*, pp.109-10

³ Becker, 'The Moral Basis of Property Rights', *Property*, (NOMOS 22), ed. J.Chapman and J.Pennock (New York, New York University Press, 1980), p.187. In contrast, Waldron, *The Right to Private Property*, p.61, thinks that only general theories of justification are appropriate targets for the philosopher, arguing that it would be churlish to reject arguments such as Locke's 'because they are not conclusive on the details of property arrangements'. It would indeed, on the other hand, this is no argument to preclude testing Locke's theory against particular situations, which is essentially what is done at the end of this chapter.

how the apparent compatibility of the interest theory of property with the demands is not quite what it seems. Investigation of the possible nature of this relation is taken up in the following chapters. It is not until chapter six that we might fully come to understand this relation and, as a consequence of this understanding, the CJPOA as liberal justice. Of course, not only will this understanding tell us something about the CJPOA; more importantly it will also tell us something about liberal justice.

1. The libertarian theory of property:

Initially, libertarians might seem to offer a way out of our problem. As we have seen in the last chapter by linking rights closely to property rights they are able to create a compossible set of rights. However, this is not necessarily a compossibility that can include the demands of the groups targetted by the CJPOA. In order to see if it can we need to explore not only the structure of a libertarian set of rights, but also who should have title to these rights.

Nozick has famously declared there to be three principles of justice in holdings: the principle of justice in acquisition, the principle of justice in transfer, the principle of rectification.⁴ These principles point to the same historical aspect of the justification of property rights as has been found already in Steiner. X's title to Y is just insofar as it was acquired justly and transferred justly. Of course we do not know yet exactly what justly means here; what we can say is that the justice of property rights depends on their having a certain history rather than fitting a certain pattern.⁵

⁴ R.Nozick, *Anarchy, State and Utopia*, (Oxford, Blackwell, 1974), pp.150-151.

⁵ For comparison of historical entitlement theories with end-state or patterned theories, see Nozick, *Anarchy, State and Utopia*, pp.153-173.

This discussion of libertarian theory focusses on this historical aspect to justification in two ways. Firstly, through the idea of self-ownership I raise questions about those who have property rights in libertarian theory. Secondly, by an exploration of the proviso, I consider the position of those without property. In broad terms therefore I look at both sides of the CJPOA debate within a libertarian context: first at the property holders, second at the groups who demand some use at least of this property. With these arguments in place it will be possible to explore any compatibility in terms of the demands as outlined in the first chapter.

The treatment of libertarianism is thematic rather than the detailed analysis of particular writers, except where appropriate. Such an approach befits my aims which are not to argue for or against any particular theory of property, although criticisms are unavoidable to some extent, but rather to test their compatibility with the hypothetical demands. Any criticisms which are raised illuminate the problems that libertarianism and liberalism more generally has in accommodating certain activities and ways of life.

1.1 Historical justifications and the problem of self-ownership:

Assuming a conception of freedom as negative, rights, as we have seen, allow us to negotiate the distribution of this freedom. Steiner argues that freedom can only be distributed within a compossible set of rights if these rights are property rights. This connection between freedom and property can be questioned - it may be argued that capitalist property rights in fact restrict people's freedom, as looked at later in this section. First though, let's note an aspect of this connection.

These rights need to have an original vindication. One of these rights is property rights in oneself, or self-ownership. Narveson provides an articulation of the link between freedom and property in oneself. Any right to perform any given action must involve the right-holder having certain things with which to perform that action with, at a minimum the right to use parts of one's own body. Thus we must have property rights in our own bodies or self-ownership. The liberty to do anything 'will follow automatically from the liberty to use those pieces of human equipment as that person will.'⁶ There are two possible implications which come from this self-ownership thesis. (1) Since one owns oneself one also owns what one produces. (2) Just as property rights in one's own body are essential for liberty so are all rights to liberty property rights: the right to free speech, for example, is the right to do what we want with what is our own, ourselves or anything else.⁷ Free speech is limited by other people's property rights; one does not have the right to free speech whilst trespassing on someone else's land. I shall suggest here that the thesis of self-ownership is both confused and unnecessary which effects how we interpret these two implications.

Self-ownership is, therefore, central to the structure of the libertarian theory. Nevertheless, it is hardly an uncontroversial notion, for there is not any one simple meaning of self-ownership. Locke of course employs the notion as a starting-point for his justification of property in the external world: 'every man has a "property" in his own "person". This nobody has any right to but himself.'⁸ The second half of this quotation asserts the usual concerns of the self-ownership thesis, the preservation of one's integrity, that one can't be owned by anyone else. The first half is more interesting and reveals the complexities of Locke's thought. The use of person rather

⁶ J.Narveson, *The Libertarian Idea*, (Philadelphia, Temple University Press, 1988), p.66.

⁷ *Ibid.*, p.66.

⁸ J.Locke, *Two Treatises of Government*, ed. W.Carpenter, (London/Vermont, J.M.Dent, 1924), p.130.

than body is significant. What people have property in is not just their physical being but their moral being as well. To have property in your moral being implies some kind of responsibility for who you are, as well as rights against other people, an implication strengthened if we consider that according to Locke we are all in fact the property of God, who we have duties to serve well.⁹ As Alan Ryan argues in his essay 'Self-ownership, autonomy, and property rights' for Locke property rights in ourselves are ultimately a way of serving God's purposes; in the end we will have to answer to God for our own lives.¹⁰ So essentially self-ownership is a matter of duties as well as rights, which is of course what the ownership of things is often about. My owning a car means that I have duties as regards that car; I can't just abandon it.¹¹

For Narveson, on the other hand, the notion plays a very different role. It is concerned with negative freedom, that no-one should interfere with one's own personal space. The differences with Locke are clear: 'we have entities over which the person is to have control, and which others must gain permission to act upon or with if their use of them is to be morally permissible'.¹² Here the person, or the moral being, holds the rights over the body as a physical entity.

As Ryan points out these differences highlight a central problem with the whole idea of self-ownership since it is presumed that there is agreement on what it means, an agreement which

⁹ Ibid., pp. 119-120

¹⁰ Ryan, 'Self-ownership, autonomy, and property rights', *Social Philosophy and Policy*, 11 (1994), p.248. The point is, he suggests, that we are owned by God and therefore *can't* be owned by anyone else.

¹¹ See Ryan, 'Self-ownership, autonomy, and property rights', p.247. No doubt, on the full liberal conception of ownership, I could abandon the car on my own land and be within my rights. What I couldn't do is abandon it on someone else's without their permission. Ownership is a matter of duties in this sense. Since ownership is in practice rarely, if ever, a matter of the full liberal conception it seems very likely that as part of one's ownership of a piece of land, or a car for that matter, one will owe duties to other people who have rights over this land. This complex nature of property is discussed later in this chapter. Ryan, p.258, further suggests that we would do much better, if we want to think in terms of self-ownership to think in terms of duties, that in effect we have duties to use the abilities, skills that we own for the good of other people. Whether this is a plausible suggestion or not is perhaps not that relevant here; what it does show us is how undefined the notion of self-ownership really is.

¹² Narveson, *The Libertarian Idea*, p.67.

doesn't exist. Self-ownership can in fact lead in various directions as the differences between Locke and Narveson show. It is surprising for a concept so central to Narveson's argument that self-ownership receives relatively little justification. Narveson's main argument seems to be that if we didn't own ourselves what is there to stop my being obliged to give one of my eyes to a blind person, and surely not even the most egalitarian of socialists would want that. He notes with obvious satisfaction that even the socialist, G.A. Cohen, has accepted 'the essential logic of the position.'¹³

Moreover, the idea of self-ownership *needs* some clarification. Social practice in this regard is confused.¹⁴ It also raises questions of identity concerning the relation between the self and that which is supposed to own it. Ryan comments here that our relationship to our bodies cannot be 'proprietary just because our bodies are also us. If you strike me sharply on the nose, you cannot escape the charge of assault by observing that you had an urge to punch a nose, but no urge at all to injure a person.'¹⁵

A final point: there is also an apparent contradiction in the libertarian position here. Recall that self-ownership is both the basis of rights and that through which property rights are generated in the external world through labour. Parents therefore own their children because they expended the necessary labour on them. If they don't, then their self-ownership is denied by their not having the fruits of their labour. On the other hand this means that the offspring of

¹³ Ibid., p.68

¹⁴ It is interesting, and perhaps revealing, to see how confused actual practice is if we conceive of ownership as protecting body rights. Under UK law, suicide is not a criminal offence and yet lesser 'offences' done to one's own body are, such as consensual sado-masochistic sex. It is illegal to engage in fights, even with mutual consent, and violent sports like boxing and rugby are acceptable. Cosmetic surgery is actively promoted whilst other forms of 'body mutilation' are condoned.

Prostitution is illegal and yet all work involves selling your body to some extent. We can sell our sperm but not our blood.

¹⁵ Ryan, 'Self-ownership, autonomy, and property rights', p.251

parents can't be self-owners; thus the paradox of universal self-ownership.¹⁶

However, not only is the notion of self-ownership confused and poorly argued for. It is also, and more importantly, unnecessary. Steiner argues that self-ownership is a precondition of having any rights at all. The slave is entirely at the disposition of her owner; to have rights she must at least be out of the owner's rights bundle.¹⁷ But this argument moves too quickly. Certainly a slave can't have any rights; however, this does not *necessarily* mean that self-ownership is a condition of having rights.

For what does self-ownership do? Firstly, it acts as a way of generating property rights in the external world; secondly, it protects bodily integrity. If this integrity is constantly threatened then the possibility of our having any rights at all is threatened. However, the second can be protected by other means, leaving the first exposed as merely a rhetorical device to convince us of the validity of an historical entitlement private property theory.

It might seem odd to claim that my right to life comes from the fact that I own my life.

Certainly a more common sense view would suppose that I *am* my life, and my right to life says that no-one shall interfere with this life without my consent. My right to life is generated by a certain conception of the person as autonomous rather by self-ownership. The notion of ownership need not enter the question at all. Similarly with my right to bodily security; this right can adequately protect my eyes or whatever else the libertarian is worried about (and rightly worried about) without bringing in the idea of owning my eyes at all. The idea is

¹⁶ See Steiner, *An Essay on Rights*, pp.237-248 for an ingenious attempt to get out of this problem. In essence, the argument is that children are not totally the products of their parents' labour but also contain a natural resource in the form of germ-line genetic information.

¹⁷ *Ibid.*, p.231

essentially that a properly formed set of civil and political rights would protect bodily integrity to the same extent as self-ownership.

Steiner criticises this line of argument against the self-ownership thesis, saying it is either false or doesn't in fact pose a genuine alternative to self-ownership.¹⁸ It is false if these civil and political rights don't actually protect bodily integrity. On the other hand if they are 'sufficient to create that network, then...such a set of perimeters itself implies a set of compossible rights and correlative duties that are fully equivalent to civil liberty-holders having property rights in their own bodies'.¹⁹ Yet this second response hardly proves what Steiner wants it to, for we are left with the conclusion the civil and political rights might be equivalent to the rights afforded by self-ownership. As such there is nothing to choose between them. One might conclude then that the choice of self-ownership is motivated by more than a desire to protect bodily integrity, but also as a way of generating private property rights.

Libertarians like to see ownership creeping into all areas of life.²⁰ Self-ownership seems to be part of this fascination. And yet there is no need for this notion except as an attractive device for generating property rights in external things.²¹ It is not us who own ourselves, but rather we stand at the centre and do the owning. This position is far less complicated and need not make us fear a state imposed obligation to give away our eyes, since the very fact of having rights creates a space within which the individual cannot be harmed.

So, to return to the two implications of self-ownership referred to at the beginning of this

¹⁸ Ibid., note at p.231

¹⁹ Ibid., note at p.231

²⁰ Ryan, 'Self-ownership, autonomy and property rights', p.254, points out that there are in fact various things that in law cannot be owned. For example the bodies of deceased persons are not owned under the common law.

²¹ It may also provide a useful theoretical position to argue against victimless crimes.

section: (1) that since one owns oneself one owns what one produces; (2) all rights are property rights. (1) may quite simply be rejected as a way of justifying property rights in the external world. This point is returned to briefly at the beginning of the next section. The rejection of self-ownership need not affect the plausibility of (2), the idea that all rights are property rights. It still makes sense to say that A's right to do B is constituted by the rights he has over the things which make up the action B. Without self-ownership, however, these rights cannot be vindicated by reference to an original title, since it is self-ownership which mediates the relationship between the self as isolated and an eventually propertied world around it, through the idea of owning what one produces. These property rights would be justified by reference to some pattern or end-state instead. A wholesale redistribution might be in order. However, they may not be compossible rights; part of compossibility, as linked to the exercise of individual choice, is the historical dimension. This dimension, as explored in chapter two, ensures that no more than one person has the rights to some thing at any one time.

The problems with self-ownership may give us reason to look for a theory of property in which this notion does not play a justificatory role. In this sense its rejection leads us to consider an interest theory of property connected with welfare liberalism later in this chapter. As important, though, is how it informs on the libertarian compatibility with the hypothetical demands of the groups targetted by the CJPOA. Self-ownership, it has been argued, leads to a particular conception of all rights as property rights, a conception in which the set of rights has an historically vindicable compossibility. As will be argued, this makes accommodation of some of the claims of these groups as outside the scope of libertarian justice. Before we consider this compatibility we need to examine in more detail the libertarian treatment of those

without property.

1.2 Self ownership to thing ownership (or what about those without any property?):

Questioning self-ownership throws into doubt libertarian property titles as historically validated. Therefore in a dispute about property rights it might not be open for people to appeal to historically based rights. David Lyons has argued cogently against the exaggerated importance that libertarians give to historical considerations. They may be important but it does not follow from this importance that they are the only factors relevant to justice.²² His argument takes us on to the other side of the libertarian theory of property to be considered here, the position of those without property.

Now it is a common claim, central as we have seen to libertarianism, that something is ours by virtue of a history that validates it as ours. This idea has great intuitive strength. Lyons considers a conflict over land in which both sides, the Native Americans and the settlers, may seek to justify their titles through such an intuitive claim. Such a claim, however, contains the unwarranted assumption, that property rights are unaffected by circumstances. In effect it says that what was held in the past has led directly to what is held in the present.

On closer inspection it seems unlikely, as a matter of justice, that circumstances do not affect property rights. If your appropriation of the only well in the desert is morally blameless when yours is the only family in the desert, it might not be appropriate any more if the population increases dramatically. And of course the libertarians acknowledge this through the use of a

²² D.Lyons, 'The New Indian claims and original rights to land', *Reading Nozick*, ed. J.Paul, (Oxford, Basil Blackwell, 1981), p.360.

proviso.²³

It is this proviso which might accommodate the claims of those without property. Some general comments about original acquisition justifications of private property set a useful context for discussion of this proviso.

Property rights have their origins in acts of original acquisition. As we have seen, to deny these acts of original acquisition, whether through labour-mixing or whatever other act is deemed necessary, is to deny self-ownership, or so the argument goes. Self-ownership, it has been suggested, provides unsteady ground as the basis for an argument for private property acquisition. In order to take the argument any further this unsteady ground needs to be assumed. There is nevertheless, even with this assumption, a profound peculiarity with original acquisition justifications specified by Jeremy Waldron, which threatens to damage the whole enterprise of trying to derive property rights from original acquisition.²⁴

Original acquisition rights are special rights in that they are dependent on some contingent event happening, in this case whatever the morally significant action of original acquisition is. They are thus distinguished from general rights such as the right to life which is had whatever; it does not depend on something special being done to achieve it.²⁵ But they are also, and very significantly, distinguished from other special rights in that it is the person who makes this

23 Ibid., p.368. Lyons' argument is much more sophisticated than the abbreviated version given here for present purposes. It is that Nozick accepts the 'historical shadow' of the Lockean proviso as possibly limiting the rights to exclusive use and enjoyment of a good, but does this in order to 'protect his assumption that property rights should be permanent and bequeathable'.

24 A.J.Simmons, 'Original Acquisition Justifications of Private Property', *Social Philosophy and Policy*, 11 (1994), p.66, argues, on the other hand, that we 'must take OA justifications very seriously'. In particular such justifications, in specifying the conditions for the acquisition of property, do show that private property is morally possible, and show that if these conditions arise again, then the taking of things for oneself will be possible again. The principles of original acquisition will, he suggests, be important in our colonisation of space, p.75.

25 See Waldron *The Right to Private Property*, ch.4, for an extended account of this distinction.

event happen who gets the right, placing everybody else in the world under a duty to respect her right. Compare this process with the generation of other special rights such as promising where it is my action in making a promise which creates a right in you and a duty in me. Therefore I bear the potentially burdensome consequences of my actions. In fact it is hard to think of any other situations in which the unitary action of one individual can create obligations in the rest of the world.²⁶ So can this right be morally justified which runs so clearly counter to the rest of morality, especially if the resource in question is important to life and in short supply?

A parallel case may help in clarifying an answer to this question. A suicidal man may oblige hundreds of onlookers below to come to his aid as he announces his intention to kill himself by jumping from the top floor of a block of flats. Here is another possible example of a unitary action obligating many others. Is there a difference between this case and that of original acquisition? It seems clear that with the suicidal man the value of his life is already taken care of, it is accounted for in people's reactions, whereas the value of the proposed property rights is still very much under debate. It cannot be assumed in an argument which is supposed to be its very justification, especially an argument which is morally unfamiliar. Simmons answers Waldron saying that such unilateral imposition of obligations is not in fact morally unfamiliar.

²⁶ In practice we can see the implications of this creation of potentially onerous duties in others through original acquisition in the history of colonialism. The creation of such duties may indeed be open to condemnation; however, colonialism should be condemned further by its too often denying that other people already had rights to the land that was colonised. To take just one example, the taking of the land now known as the United States from the Native Americans. W.Churchill in 'Perversions of Justice: a Native-American Examination of the Doctrine of US Rights to Occupancy in North America', *Moral Controversies*, ed. S.J.Gold (Wadsworth, 1992), pp.437-38, argues that the US has neither moral nor legal title to most of its territory. It was appropriated from the Native Americans through a reinterpretation of international law, the Marshall Doctrine, which denied rights to the original occupants of the land. This denial of rights can also be found on the level of theoretical justification: M.Rothbard, *The Ethics of Liberty*, (Atlantic Highlands NJ, Humanities Press, 1982), ch.11, describes how America's land was settled without mentioning the inhabitants of that land, the Native Americans. Narveson, *The Libertarian Idea*, pp.86-87, describes the context of original acquisition as being one of a self-sufficient society living within a wider unoccupied area. Since it would take an imaginative re-reading of history to suppose that this was the condition of America when it was settled, it would seem that present titles to America's land are doubtful to say the least. Far from it for Narveson, who spends the latter part of his book outlining ways in which such titles might be strengthened.

He gives as examples various exercises of property rights, making a will, buying a stamp, which impose obligations upon others.²⁷ But of course they do; this is the whole point of private property which these examples already accept. What Waldron is asking is whether on analysis it should be accepted at all. The answer, if we take the rest of our morality seriously, is that it can't be, at least not on these grounds

The way libertarianism tries to alter our perceived morality is interesting and deserves further analysis. It also further strengthens the case for Waldron's argument above. Alan Haworth explores Nozick's philosophical method at some length in his book Anti-Libertarianism. Much of Nozick's argument depends on appeals to intuitions. But as Haworth notes there are intuitions and intuitions. There are those such as equal concern and respect for persons which seem to lie at the very foundations of our morality; we can't reject them and stay within the moral community. And there are those, such as adultery is always wrong, which are very much up for grabs.²⁸ What Nozick does is to move from the core anti-consequentialist argument for rights which relies on the intuition, but hardly arbitrary intuition, that people should never be treated merely as a means, to a radical new morality where the parable of the Good Samaritan would have had him negotiating a contract with the dying man to take him to hospital.²⁹ We can agree with the Nozickian version but we have to be aware of what we are rejecting if we do, that we never have any obligation to help those in need, that our private property rights always take priority.

The same might be said of the libertarian attempt to persuade us of the justice of original

²⁷ Simmons, 'Original acquisition justifications of private property', p.83.

²⁸ A.Haworth, Anti-Libertarianism, (London/New York, Routledge, 1995), pp.74-76.

²⁹ *Ibid.*, p.89. This examination of the libertarian version of the famous parable is part of Haworth's broader argument that libertarianism is not a 'philosophical theory for which good arguments, with well-founded premisses, can be produced'. Instead it is, he claims, an 'exercise in rhetoric', p.81

acquisition. For what this says is that it's fine to take for yourself as much as you want of any given unowned resource, and remarkably put everyone else in the world under an obligation to respect your acquisition, even though they may have had nothing to do with it. Put as such we might see libertarianism as embodying no social concern but only concern for the individual; further, it totally rejects any notion that other people are important except insofar as they are bearers of property rights. The very notion of original acquisition can therefore only be accepted at its peril. Contrast with the suicidal man; his action obligates people simply because morality is based on the idea that people are in some sense important. The attempt to persuade us that property rights are equally important cannot really take place when the very justification of those rights is being put forward.

Libertarians might rightly feel misrepresented by this argument. For their theory does embody a social concern in the form of the proviso, as previously referred to. We now need to return to consideration of this proviso with the framework in place for understanding why it is needed. In this exploration I suggest that the Nozick / Narveson use of the proviso is inconsistent with their libertarianism. For a more consistent use we need to turn to Steiner. Problems with how this latter use may accommodate the demands of those without property are turned to later in the chapter.

The action that connects self-ownership and thing ownership is not, I think, a very interesting area of debate.³⁰ The (justified) criticisms that Locke's labour theory has been subjected to are

³⁰ Munzer, *A Theory of Private Property*, pp.61-70, identifies two means of the acquisition of unowned things: (1) incorporation by which external things, food for example, become property by being incorporated into the body; (2) projection in which the person becomes embodied in external things. Land would provide a typical example of something acquired through this latter means. Obviously, both these means rely on the prior assumption of property rights in one's own body, since it is through being associated with these rights in some way that rights in external things can be generated.

testimony to the difficulties connected with this move.³¹ Instead we do better to focus on why other people should consent to the appropriation of common, or originally unowned, resources. For if they give their consent, or rather it is argued that they would, then the question of the particular action that is needed to move from self to thing ownership falls away. This seems to be the position taken by Narveson, and Nozick, the former saying 'To acquire an object is to do something that either constitutes, or at any rate is regarded by some relevant people as constituting, good reason for recognising certain rights of yours in relation to that object'.³² So what we in fact need to consider is how other people might possibly give their consent to private appropriation. However, since such consent would in practice be almost impossible to come by (not every appropriation could be subjected to the test of universal consent); there is need for some means whereby appropriation is possible without consent, but with a concern for the well-being of others. Thus the Lockean proviso and various reflections on it. Consideration of this proviso is central to the success or otherwise of the libertarian position. Both Narveson and Nozick admit that libertarianism without a proviso on acquisition would be unacceptable.³³ What we need to ask therefore is how the proviso embodies this social concern, and can it from a libertarian point of view?

The nature and therefore the consequences of the proposed provisos differ. Locke's sufficiency proviso, that enough and as good should be left for others after appropriation, is notoriously hard to interpret. On one reading it might be taken as a general right to property which would seem to block the development of private property since it would involve a constant

31 For example see Nozick, *Anarchy, State and Utopia*, pp.174-175; Carter, *The Philosophical Foundations of Property Rights*, pp.15-18; Waldron, *The Right to Private Property*, pp.184-191.

32 Narveson, *The Libertarian Idea*, p.85.

33 *Ibid.*, p.69; Nozick, *Anarchy, State and Utopia*, p.178. Waldron, *The Right to Private Property*, p.283, for reasons that will become clearer later, refers to Nozick's use of the proviso as 'the half-hearted indulgence of bad conscience about the ultimate unacceptability of a principle of justice in acquisition'.

recalculation and redistribution of resources.³⁴ So perhaps we have to see Locke as writing in a very different historical circumstances in which the abundance of resources meant that the sufficiency proviso need not cripple his theory as it does now.³⁵ With these circumstances changed only property in things in relative abundance would be allowed.³⁶

Alternatively the sufficiency proviso can be read as merely an effect of the spoilation proviso, which restricts what one can acquire to what one can use without it spoiling.³⁷ Since one can use only a small amount of resources without them spoiling there will be enough and as good left for others. However, as the invention of money essentially renders the spoilation proviso redundant, allowing an unlimited accumulation of wealth, the efficacy of any possible sufficiency proviso is questionable as well.

The libertarian use of the proviso moves between these two interpretations of Locke. Certainly it cannot be so strong as to prevent the continued development of private property; on the other hand it needs to have some force to accommodate the social concern that might make this development a possible matter of moral approval. The libertarian agenda is, however, much more adventurous than this, seeking private property in all aspects of life. Thus the proviso needs to be interpreted in a very particular fashion, and a fashion that could not be accused by others of being arbitrary.

The curious point about the libertarian proviso, for Nozick and Narveson at least, is that it is

³⁴ Waldron, *The Right to Private Property*, pp.213-214

³⁵ Locke's emphasis in *Two Treatises of Government*, Book 2, ch. V, on America as a place of wilderness (see note 26) certainly indicates a world perceived as very different from our own.

³⁶ This is the line taken by Carter, *The Philosophical Foundations of Property Rights*, on the proviso, p.134

³⁷ Locke, *Two Treatises of Government*, p.131. Waldron, *The Right to Private Property*, p.211, interprets the proviso in this way.

there not to be used. For if the justice of some original acquisitions could be questioned through it this would necessitate the kind of redistribution of property rights that the libertarian wants to avoid. Thus the proviso is set at the state of nature level. That is, acquisition is allowed if it does not leave people worse off than they would have been if things were unowned. The use of this proviso might allow original acquisition within an acceptable morality and justify the whole libertarian agenda. It is understandable then that it is interpreted in such a narrow fashion. Narveson assumes that 'A beggar on the streets of Manhattan is enormously better off than a primitive person in any state-of-nature situation'³⁸ thus allowing an original acquisition theory with a proviso but one which will not in fact affect the freedom to acquire. Similarly Nozick suggests that 'the question of the Lockean proviso being violated arises only in the case of catastrophe.'³⁹

Now considering this proviso is absolutely crucial for the libertarian case it is surprising that there is so little argument for where its level is set. So is there a strong case for the libertarian proviso or is it merely a convenient assumption necessary for their argument? Cohen argues that there is not and that since the level of the proviso might be set at other levels, which would greatly problematise the development of private property, the justification of private property through original acquisition theories cannot work. But rather than enter this well-fought debate⁴⁰ I wish to focus on the libertarian arguments for why a system of private property, developed through original acquisition, leaves people, including those without property, better off than they would be in a state of nature. Nozick introduces 'the various

38 Narveson, *The Libertarian Idea*, p.92

39 Nozick, *Anarchy, State and Utopia*, p.181.

40 For example see G.A.Cohen, 'Nozick on appropriation', *New Left Review*, 150 (March/April 1985), for an argument that the selection of the baseline of common ownership is arbitrary; D.Conway, 'Nozick's Entitlement Theory of Justice: Three Critics Answered', *Philosophical Notes*, (occasional publication of the Libertarian Alliance), 15 (1990), responds to Cohen's argument. See also Narveson, *The Libertarian Idea*, pp.69-73 and pp.87-93.

familiar social considerations favouring private property',⁴¹ essentially empirical arguments for its relative efficiency. These do not, Nozick notes, offer a utilitarian justification of private property but rather enter to support the satisfaction of the proviso. Similar considerations enter Narveson's arguments in this area when he suggests that it is only within a system of capitalism that people will be motivated to develop their resources.⁴² Locke, it must be remembered, spends at least half of his chapter on property arguing for the relative efficiency of capitalism.⁴³

Cohen comments here that since a minor premiss of the libertarian argument relies on empirical justification then it can be refuted by contrary empirical evidence. The libertarian theory then does not have the clarity that befits a theory which doesn't involve itself in consideration of consequences, since consequences are central to its argument.⁴⁴ But more important here is the point that if empirical considerations are in fact central to the libertarian argument then surely it is up to the libertarian to compare her supposedly best system with other systems, rather than restricting the range of comparison to the state of nature or no system at all. In other words by the terms of their own justification of the proviso the libertarians concede that it is set at an arbitrary level.

Another, equally difficult, problem now arises for the libertarian: if the justification of the proviso is based on empirical considerations don't we see values other than liberty entering the libertarian theory? In effect what does the 'worse off' in the libertarian proviso actually refer

41 Nozick, *Anarchy, State and Utopia*, p.177

42 Narveson, *The Libertarian Idea*, p.91.

43 For example, the Americans, who haven't properly exploited their resources through appropriation, are 'rich in land and poor in all the comforts of life...a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day labourer in England,' *The Two Treatises of Government*, p.136.

44 Cohen, 'Nozick on appropriation', p.100

to? One would imagine that it should refer to people's liberty, asking do people have less liberty than before after appropriation from the original unowned context. Thus Narveson on capitalist property rights: 'it is obviously impossible that a libertarian could consistently defend them if ...all sorts of other people's *liberty* would be *restricted* by them.'⁴⁵ And yet we have seen that the support for the proviso comes not just from considerations of liberty but also from considerations of material well-being, in effect considerations of efficiency. So it has to be asked if the libertarian is justified in using a proviso at all? Since the proviso uses considerations other than liberty and accepting that to have it must mean that it is capable of being activated at some point, even if only in situations that might be deemed catastrophic, do the libertarians then admit that people are entitled to something other than liberty?

To consider these questions let's take a scenario that Narveson uses.⁴⁶ There is a tract of unoccupied land. The Boones come along and claim the most productive part of it, leaving the next family to appear, the Smiths, only the rocky and infertile land. Couldn't the Smiths claim to have been made worse off by the Boones' appropriation? Not according to Narveson's proviso; in fact they are now in the enviable position of being able to trade with the productive Boones.⁴⁷ But what, it might be asked, if not only the productive land was taken but the rocky land as well and all the rest of the land in our hypothetical state. It seems that here the Smiths would in fact be worse off than they would be in a state of nature since there they at least then had the *opportunity* to use land, even if not the security of possession. The libertarian riposte here would be that under a system of pure capitalism this wouldn't happen, invoking the usual empirical considerations. Even if all resources were appropriated people have their labour to

45 Narveson, *The Libertarian Idea*, p.62.

46 *Ibid.*, pp.87-93

47 One does wonder what it is they are going to trade with from their barren piece of rock. It is far more likely that they will have to sell their labour to the Boones who will get rich at their expense.

sell, and in a free market competition would ensure that they got a fair price for this. Be this as it may, my point is only that in some situations the proviso must come into force, otherwise why have it at all, and by having it the libertarian admits that people are at least entitled to something, and that something isn't just negative liberty. Yet such entitlements seem inconsistent with libertarian principles.

For the only concern of a libertarian politics is, we are told, individual liberty, conceived of negatively. Narveson tells us: 'We come into the world equipped with the right not to be harmed, not to have our liberty violated. But we don't come with a positive right to any resource. And in a desperate circumstance, this could be taken to mean that we do not come equipped even with a "right to life". In the sense in which this is so, however, it means a *positive* right to life, that is the right to be *helped to remain alive*, rather than merely the right not to be deprived of the life we have.'¹ Harsh words indeed, but with the virtue of honesty. On the other hand, in the state of nature people are at least alive even if they do not have any rights to this effect; no-one has a duty to give them the resources necessary for life or not to interfere with their life. But they do have the opportunity to remain alive - this is the bottom line below which even the libertarian will not go. Is this admission incompatible with Narveson's assertion above that no-one has a positive right to life? Well, it is and it isn't. It isn't because in the state of nature people do not have the right to the resources essential to the maintenance of life. It is because it is clear that in using the state of nature proviso there is some value at least placed on the mere fact of being alive, which isn't there in the main drive of the libertarian argument. In effect the difference is between not

¹ Ibid., p.100

having a duty to keep someone alive and having a duty to give them the opportunity of life.

Perhaps another illustration would help clarify the point. To adapt an example of Nozick's,⁴⁹ post-apocalypse the Boones appropriate the only habitable island in the world. The Smiths come along in their battered old rowing boat, half-starved and dying of thirst. What are the obligations of the Boones towards them? On one model they have no obligations at all since no-one has a positive right to life. The Smiths cannot claim that their negative liberty has been affected by the Boones' appropriation of the island. Your liberty can only be affected once you have property; in fact it is the Boones who would have a claim against the Smiths if the latter clambered ashore in search of food and water. On the other model, however, the Boones do have obligations towards them since it is clear that the Smiths are in a potentially worse situation than the state of nature. Without coming ashore on the Smiths' island they have *nowhere* else to go. The Boones owe them then the opportunity to remain alive, though exactly what form these obligations would take it's hard to tell.⁵⁰

It is tempting to conclude that the libertarian's use of the proviso is a recognition that the purity of their theory needs tempering with a modicum of decency when faced with its own implications in practice. Such a conclusion would be no doubt true, and yet the problem would seem to lie a lot deeper, or at least this recognition is a consequence of a deeper problem. Property to the libertarian is only important if you have it. This is a consequence of the status that is given to negative liberty. One's liberty can't be interfered with if you have nothing to interfere in; it can only be interfered with if you have property. Accepting the idea of self-

49 What Nozick, *Anarchy, State and Utopia*, p.181, calls a 'desert island situation'.

50 Nozick says here, *Anarchy, State and Utopia*, p.180: 'an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso'.

ownership, everyone does at least have property in their bodies which gives them certain negative rights. However, it is through using things in the world that we act and survive, so if we are to talk in terms of the very basics of morality, that human life is valuable, we have to reject the pure libertarian thought, because everyone one must have a right to these basics. Which libertarians themselves do - they are compelled to do so if they are to talk a comprehensible moral language at all. Attempts to modify an unfamiliar morality only succeed by bringing in elements unfamiliar to libertarianism, which only goes to indicate the problems inherent in the libertarian position.

Turning to Steiner we can find a different perspective on these problems. We have already discussed one of his proposed original rights, that to self-ownership. Through some version of the labour theory this right can create titles in unowned things. However, it is not sufficient to do so on its own. It must be combined, in a form of the Lockean proviso, with our equal original property rights which entitle us to equal bundles of original things.⁵¹

This use of the proviso in our equal original property rights is significantly different from those of Nozick and Narveson. It does not, as Steiner notes,⁵² appeal to some level of economic well-being that would have existed if the good had not been appropriated. Rather it is a right that we have, regardless of baselines of comparison. It therefore avoids the charge of inconsistency brought against the Nozick / Narveson use of the proviso. It also has consequences for those without property rights. Redistribution of various goods becomes an integral part of justice.

51 Steiner, *An Essay on Rights*, p.236.

52 *Ibid.*, footnote at p.236

The implications of this second original right are that 'in a fully appropriated world, each person's original right to an equal portion of initially unowned things amounts to a right to an equal share of their total *value*.'⁵³ This value appears to refer to their worth besides the labour⁵⁴ which has been exerted on them: 'Titles to sites thus amount to leaseholds; each such owner owes to the global fund a sum equal to the site's rental value, that is, equal to the rental value of the site alone, exclusive of the value of any alterations in it wrought by labour.'⁵⁵

As a result of this redistribution of rental value Steiner can avoid the charge made against Nozick that he doesn't address properly the issue of surplus value, that is that part of market value which is due to scarcity and doesn't seem justifiable on any account of the link between labour and ownership. Steiner's articulation of this second original right makes it very clear exactly what one does and does not own. The Wilt Chamberlain example is central in Nozick's 'argument' that we are entitled to the full value of our holdings.⁵⁶ As a famous basketball player he can make vast amounts of money. If fans are prepared to freely transfer money to him he has a right to this money. But as Fried points out Nozick has got the problem the wrong way round. It is not a question of whether fans have a right to give him money, but rather one of whether he fully owns the market value of his basketball talent, the value of which is largely informed by the fact that for some reason society likes basketball and his talent is a rare one.⁵⁷

Steiner positions himself here between Nozick and Rawls. The latter argues that since such

53 *Ibid.*, p.271

54 For of course to appropriate the fruits of this labour would be to deny self-ownership

55 *Ibid.*, pp.272-73

56 Nozick, *Anarchy, State and Utopia*, pp.160-164

57 See B.Fried, 'Wilt Chamberlain revisited: Nozick's "Justice in Transfer" and the problem of market-based distribution', *Philosophy and Public Affairs*, 24 (summer 1995), p.242.

natural talents as Wilt's are purely a matter of luck they should be pooled.⁵⁸ Steiner suggests that such abilities are a combination of genetic information which, as a natural resource should be pooled, and parental labour on the child, which shouldn't be pooled since to do so would be to deny self-ownership.⁵⁹ Exactly how these two are to be distinguished is not entirely clear. Certainly, however, Wilt Chamberlain's fortune would be questionable in a Steiner state.

Finally, there is a third category of things, alongside the value of raw natural resources and genetic information, up for redistribution in such a state. This category is the estates of the dead (including their bodies). Steiner argues that dead people have no rights; therefore we owe them no correlative duties, though we may owe them serious moral duties.⁶⁰ The transfer of ownership involves the transfer of correlatives. Since the testator can't take on any duties, by virtue of being dead, transfer of ownership by bequest must happen through an executor. The executor's right to transfer is founded upon the legal fiction that the testator and the executor are the same person. Bequest is a creation of the law, to which there can be no moral counterpart, with the result that dead people's estates join raw natural resources in the category of initially unowned things.⁶¹

Steiner's approach clearly has greater distributional potential than that of Nozick and Narveson. It may therefore be able to account for the claims of greater numbers of people. It is also more consistently libertarian, not relying on some implicit assumptions about economic efficiency. On this positive note, I leave discussion of the property theory of libertarianism. It

58 J.Rawls, *A Theory of Justice*, (Oxford, Oxford University Press, 1973), pp.100-104

59 Steiner, *An Essay on Rights*, pp.275-77

60 *Ibid.*, p.250

61 *Ibid.*, pp.253-58. It is interesting to note that, alongside these other changes on the libertarian theme which lead to greater redistributive potential, Steiner also makes explicit the importance of not discriminating against people in terms of place, or the state of which one is citizen. See pp.262-65; also Steiner, 'Libertarianism and the transnational migration of people', *Free Movement*, ed.B.Barry and R.Goodin, (Hemel Hempstead, Harvester Wheatsheaf, 1992).

will be returned to towards the end of this chapter after the interest theory of property has been considered.

To sum up on the discussion of libertarianism. (1) The idea of self-ownership as central to the libertarian justification of private property was criticised as confused and unnecessary. These criticisms give us reason to look at a theory of property which does not involve the notion of self-ownership: the interest theory. As importantly, self-ownership was linked with the idea that all rights might be property rights. (2) If all rights are property rights, then the position of those without property rights might be a precarious one. It is a position also relevant to the practical focus of this work, the demands of the groups targetted by the CJPOA. Thus the position of those without rights in libertarian theory was considered. The arguments of Nozick and Narveson were criticised as inconsistent; furthermore they can give little consolation to the propertyless. Steiner, it was suggested, might licence greater redistribution. However, these claims can still only be articulated through property rights. Whether this is a position that might take account of our hypothetical demands I leave for later consideration.

2. An interest theory of private property:

Private property as a category is less important to this welfare wing of liberalism than its libertarian counterpart. Furthermore, on the account of interests given in chapter two a great amount of flexibility is probably possible in how interests might justify a right to private property. Therefore the intention here is not to give a detailed account of any possible theory, but rather to point to several issues which are important in its possible compatibility with the demands of the groups targetted by the CJPOA. As will be concluded in this chapter there is a

non-compatibility, but one which is more complex than that resulting from libertarian theory.

Much of the rest of the thesis deals with exploring reasons for the non-compatibility.

John Rawls provides a suitable starting-point. He gives two different answers, along the lines given in chapter two, as to how the right to property might be interpreted: (1) the right to private property as the freedom to hold (personal) property,⁶² as one of the basic liberties agreed upon in the original position. Note, that this is not the libertarian claim that property is only important if you have it. Rather it argues that everyone should have the opportunity to be part of the property-owning class. It says nothing about our actually having any property, only that we shouldn't be prevented from doing so.⁶³ To deny the pursuit of private property is to deny a possible pursuit of the good. (2) The distributive implications of Rawls' difference principle: this principle holds that legitimate property rights are held in accordance with a pattern of distribution, that they benefit the least advantaged more than any other system, rather than in accordance with how they have been acquired and transferred. The importance of having property rights lies in the having of them rather than in how they have been acquired and transferred. The interest theory leads to a patterned rather than historical theory of distributive justice.

However, this principle could justify a system of collective or common property in order to minimise inequalities. To move to private property rights we need to appeal to some general interest of individuals, recalling Raz, which these rights might serve. One course might be that of Hegel, though as noted earlier his theory of private property as necessary towards the development of personality involves a particular view of the human good which is contrary to

62 Rawls, *A Theory of Justice*, p.61

63 What counts as prevention will clearly make a difference in how such a right might be interpreted.

liberalism. However, other interests might be served by this right, interests such as privacy or control which are essential to the pursuit of any form of the good.⁶⁴ Most importantly if these interests are important they are so for everyone; we have then a general right to property in contrast to the special right to property that the libertarians articulate. The interest in having property is important in itself, not because some such action as labour-mixing has made it so.⁶⁵

It is not important in this context to establish an argument connecting private property to any particular interest, only that such an argument is possible. Neither is it important to establish that private property is necessary for the protection and promotion of these interests.⁶⁶ What we might have here is what Simmons calls a permissible justification of private property, one that is morally legitimate in that it does not violate any basic moral rules.⁶⁷ This possibility in turn raises the question of what kind of things we should hold property rights over in order for these interests to be served. Certainly sufficient food and drink seem essential to control or privacy. Yet it is unclear that these things could ever be held other than privately, certainly at some point in consumption; nor is it clear that, although necessary for these interests, they are sufficient for it. It seems arguable at least, and that's all that is needed here, that to take these interests seriously may mean giving people some stake in the means of production, and in this particular context land.

⁶⁴ See, for example, Munzer, *A Theory of Property*, ch.5, for an argument as to how private property might establish and protect these interests; Waldron, *The Right to Private Property*, ch.8, for an account of various possible interests that might justify private property; J.Christman, *The Myth of Property*, (Oxford, Oxford University Press, 1994), ch.9, on the connection between property and control.

⁶⁵ Exactly what kind of equality of holdings follows from this general right need not be explored here. Certainly, however, there must be some sort of equality, unlike Hegel who, having theorised the importance of property in the development of personality neglects to address the implications this general right might have on the poor. See Waldron, *The Right to Private Property*, pp.377-386, and Munzer, *A Theory of Property*, pp.154-155.

⁶⁶ Munzer, *A Theory of Property*, p.97, argues that there is no necessary link between these interests and private property. It actually seems quite plausible, as he notes, that large amounts of private property in fact hinder control; one becomes owned by the property. Hegel, on the other hand, who is looked at briefly in the final chapter, does posit a necessary link between the having of private property and the development of personality.

⁶⁷ Simmons, 'Original acquisition justifications of private property', p.68. Permissible justifications are contrasted with optimal justifications which argue that private property is simply better than any other option as regards certain important moral goals.

To come back to the CJPOA. Now, the conflict between land-owners and groups excluded from the land may be expressed in terms of interests. It is a conflict between the interests that holding private property in land serves, and the interests of those who equally need access to this land but do not have property rights over it. These latter interests may be expressed in terms of rights. Whether there is actually sufficient reason to do so does not need arguing here, the point being that it is only by expressing them in terms of rights that they are recognised within liberal society. So we have the rights of property holders against the rights of the targetted groups.

3. Possible resolutions

The theoretical positions are now in place to explore the compatibility of liberalism's commitment to private property with the demands of the groups targetted by the CJPOA. To avoid confusion in what becomes a rather involved argument it is important to reiterate exactly the various issues at stake in the exploration of this compatibility. The claim made in chapter one, remember, was that the CJPOA may be the product of liberal justice. The exploration of compatibility is part of the argument that may lead us to this conclusion. So, a compatibility between these liberal theories of property and the hypothetical demands of the targetted groups, which the Act excludes or oppresses, would show that it is not in fact a product of liberal justice; a non-compatibility would indicate that it is. This exploration is not, on the face of it, helped by what appears to be a confusion at the heart of the CJPOA. Nevertheless, as we shall see, it is the confusion which eventually allows us to understand the Act as liberal justice.

There is, however, a lot of argument to be had before we get to this understanding. It is not fully reached until chapter six. First to the present problem of compatibility; since my intention is to be as fair as possible to the liberal, it is important to consider the flexibility of property rights which may structure a possible resolution.

3.1 Breaking up property:

In the present context, property may be broken up in three significant ways: (1) a consideration of the various rights in the property bundle; (2) a distinction between the different kinds of things that property rights may be had over; (3) the different kinds of property systems that property rights may exist within. Conceiving of property in this flexible way may allow us to split the property bundles over land in order to effect possible resolutions in the considered conflict over land.

(1) To have property is, strictly, to have various rights over something. Therefore property does not point to a relationship between a person and a thing, since that thing is not capable of holding the duty correlative to the right, but rather between persons over that thing. Honore identifies eleven of these incidents, which together constitute full liberal ownership; there is some agreement that the core incidents are the rights to possess, to use, to manage, to the income, to the capital, to security.⁶⁸

Clearly, these rights may, and are more than likely to, come apart. That is, one person needn't

⁶⁸ See Becker, Property rights: philosophic foundations, p.19 and J.Christman, 'Distributive justice and the complex structure of ownership', Philosophy and Public Affairs, 24 (summer 1994), p.227. The other incidents are the power of transmissibility, the absence of term, prohibition of harmful use, liability to execution and residuary character.

hold all of them at the same time. If I rent a house I have the rights to use and possess it (at least) but not the rights to the income or the capital. Now, any brief reflection on the things that we own will find it hard to come up with a constant that defines this ownership.⁶⁹ The most uncontroversial candidate is the right to manage or control over one's property, and certainly it seems that if one has control over one's transfer of property rights to other people one still remains the owner.⁷⁰

(2) Not only may these property rights be held simultaneously by different people but they may be held within different property systems at the same time. Thus private, collective and common property point not only to the different ways in which society can in general organise its holding of things, but also to the way in which particular rights within the property bundle may be held. The set of rights over any one thing may be private, collective and common all at the same time.⁷¹

(3) These property rights, private, collective or common, exist over many different goods. The differences between these goods lend themselves to differences in the various ways in which property rights might be unbundled into private, collective and common rights. As my focus

⁶⁹ There is a large literature on this subject of ownership. T.Grey, 'The disintegration of property', *Property*, (NOMOS 22), ed. J.Chapman and J.Pennock, (New York, New York University Press, 1980), argues that since there is no idea of ownership which can bind the concept of property together, then property is no longer an important political or legal category. Waldron, *The Right to Private Property*, pp.47-53, and Becker, *Property Rights: Philosophic Foundations*, pp.20-21 and 'The moral basis of property rights', 190-192, argue that ownership might not involve any common features, but all cases of ownership are linked together in a network akin to Wittgenstein's family resemblances. Christman, *The Myth of Property*, ch.7, argues that there are in fact two distinct kinds of ownership, control and income, both susceptible to radically different justifications. The significance of this debate on ownership is explored further in chapter seven.

⁷⁰ It is arguable that ownership is possible without control. Thus P.Harris, *An Introduction to Law*, (London, Weidenfeld and Nicolson, 1984), p.103, suggests that today it is shareholders who own most big firms and yet it is executives who exercise effective control, although they may not have any shares themselves.

⁷¹ For present purposes private property rights may be defined by the nature of the right-holder, an individual (or some body acting as an individual), as holding these rights exclusively; collective property is held exclusively by some collective, not reducible to the separate rights of the defined collective; common property points to rights that are held by a set of individuals non-exclusively. See C.B.Macpherson, 'The meaning of property', *Property: Mainstream and Critical Positions*, ed. C.B.Macpherson, (Toronto, University of Toronto Press, 1978), for a somewhat different account.

here is private ownership, I assume private control over a good, but with the possibility of collective and common property rights existing within this form of ownership.

English law draws a distinction between real and personal property, the former dealing with the land and the latter with the rest.⁷² The property rights bundle as regards personal resources is more likely to approximate towards Honore's full liberal conception, thus encouraging in us the idea that we own things rather than enjoy rights. This 'agglomerative tendency', in Donahue's words,⁷³ is hardly surprising in the case of goods such as apples. It would be inconvenient to say the least for the person who has the right to possess the apple not to have the right to use it. Land lends itself less easily to this agglomerative tendency. As Henderson points out the fact that land is permanent allows 'the creation of a diversity of concurrent and consecutive interests.'⁷⁴ The definition of land in law confirms this tendency towards disaggregation: 'Land includes land of any tenure, and mines or minerals whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also...a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land'.⁷⁵

In practice we can see how the property rights over land may be separated and defined. X has an estate in fee simple, which gives her most if not all of Honore's incidents. However, she may lose or be restricted in the exercise of these rights in various ways. (i) She may contract

⁷² See J.MacKenzie and M.Phillips, *A Practical Approach to Land Law*, (London, Blackstone, 1993), p.337. The difference actually has its roots in the type of action that could be taken to retrieve the property in feudal times. It may be noted as well that real property is held off the Crown; personal property is held fully.

⁷³ C.Donahue Jr., 'The future of the concept of property predicted from its past', *Property*, (NOMOS 22), ed. J.Chapman and J.Pennock (New York, New York University Press, 1980), p.32.

⁷⁴ N.Henderson, *Land Law*, (London, Sweet and Maxwell, 1988), p.1.

⁷⁵ Land and Property Act 1925, s.205 (1) (ix), given in MacKenzie and Phillips, *A Practical Approach to Land Law*, p.334.

them to someone else. This would give two sets of private property rights under X's control.

(ii) The government decides it needs her garden for a new motorway, under what Thomson calls the metarules for such situations she may be forced to hand it over.⁷⁶ In other words the metarules of a society may prescribe for the dominance of collective property rights over private property rights in certain situations. (iii) A public right of way through her garden would constitute a common right not to be excluded from use of that right of way.

There are then, in what is not an unusual scenario, private, collective and common property rights under private ownership. It is in recognising this flexibility of property rights that we might come to work towards a resolution of the conflict of rights considered here.

Steiner's theory explicitly captures this complex nature of property rights. For all rights to be property rights they cannot all be rights of full liberal ownership. Rather someone's right to use something for a specified period of time is consequent on someone else who has the right of control contracting them this right. This element of control captures Steiner's idea that all rights are exercisable. Similarly, as shall be looked at in some detail, the interest theory can take account of property rights as a bundle that can come apart in various ways; two people's interests in the same piece of land may be accounted for if they hold different rights over that land.

3.2 The libertarian compatibility:

Recall that two aspects of the libertarian theory of property were discussed: self-ownership,

⁷⁶ J. Thomson, The realm of rights, p.339

and the position of those without property. Now, the criticisms raised against libertarians in these respects may raise doubts over the value of any attempt to see how libertarianism might accommodate the demands of the targetted groups since as a justification of private property it is so questionable. They do, however, indicate some of the problems that libertarianism might have in accommodating both demands, and certainly these criticisms give us cause to look towards other possible theories of private property. However, it is also these questions that begin to lead us towards an understanding of welfare liberalism's more complex relationship with the demands. It is for these various reasons that it has been necessary to discuss the libertarian theory of private property in some detail.

Self-ownership was questioned on the grounds that it is confused and unnecessary except as a way of generating property rights from unowned resources, in a type of justification that, it was argued, is morally unfamiliar. This unfamiliarity is dealt with through the use of the proviso. It was suggested that the provisos of Nozick and Narveson are inconsistent with their libertarianism; the proviso of Steiner is both more consistent and more distributive.

Nevertheless, both can only articulate claims through property rights. Thus we come back to self-ownership; even one's relationship with oneself is proprietary.

Bearing these points in mind, how may libertarianism accommodate the hypothetical demands of the groups targetted by the CJPOA? These are, it will be remembered:

- (1) use of other people's land with their consent
- (2) use of other people's land without their consent

The above discussion on the flexible nature of property should make it clear how these demands may be variously interpreted. They could be asking for use within the context of ownership, or control; or they might be asking for use whilst control or ownership actually lies with someone else. I refer to these as interpretations (A) and (B).

Demand (1): A distinction has been drawn between what might be called right and left libertarians, between the libertarianism of Nozick and Narveson and that of Steiner. Both wings would willingly agree to (1). To deny people the possibility of such a contractual arrangement would be to limit their freedom, or to limit that through which this freedom is structured, their property rights. The possible flexibility of such arrangements has been indicated in the previous section - a piece of land with common rights to use and income but still under private control, and therefore ownership, might exist.

But it is, importantly, precisely certain kinds of uses of land on this consensual basis that the CJPOA forbids. For example, the restrictions on raves and festivals as outlined in the opening chapter apply whether the assembly is a trespassory one or whether it is taking place with consent on private land. So in this regard, the Act, far from being a strengthening of private property is the intrusion of public rights on private. This demand then is for a strengthening of private property rights. We can now begin to qualify our original assertion, that the CJPOA involves, amongst other aims, the strengthening of private property rights in land. For it is quite clearly not strictly about the protection of private property per se; rather it might be motivated by an agenda of keeping some people and lifestyles off the land. This point, although apparently small, is vital in an understanding of liberal justice and will be returned to at length in later chapters. Its significance will become clearer in the conclusion to this

chapter.

In its compatibility with this demand libertarianism is in opposition to the CJPOA. So far then, we might conclude that the CJPOA is an illiberal piece of legislation. Consideration of the second demand leads to a contrary conclusion.

Demand (2) This demand might be interpreted in two different ways, as indicated in the above analysis of property.

Interpretation A: It might be taken broadly as demanding a general right to private property, in the sense of ownership, in land as a condition of use of this land. It asks as a matter of right, a demand of justice, for private property in land. Certainly the right libertarians are not able to accommodate such a demand. For them property is only important if you have it; besides the proviso, not having property in land is not something that could be argued to be a violation of rights. Left libertarians could put a slightly different case. Steiner's second original right, that we all have a right to an equal share of initially unowned resources appears to point to a right to an actually existing piece of land, as in the demand. However, this right, as explored above, means that we have a right to part of the value of land held, the part that it constituted by its being a raw natural resource and social value added, rather than full liberal ownership of this land. On the other hand, this original right itself prevents full liberal ownership of the land. We see again how the flexibility of the property bundle might accommodate various claims simultaneously.

It is not obvious though that it can accommodate the demands of the groups targetted by the

CJPOA. There has in fact been amongst land reform campaigners subsequent to the CJPOA some emphasis on the ideas of Henry George and the need for a payment from owners to the community of the value of their land that is generated by the community.⁷⁷ But these ideas, however valid, do not address the needs of the demands in hand, which are to actual use and enjoyment of land for certain activities, not simply for some partial right to the income from that land. Neither wing of libertarianism can meet these demands.

Interpretation B: Alternatively demand (2) might be interpreted more narrowly, arguing not for a general right to property but that as a matter of moral right people have sometimes a right to use other people's land without their consent. This right to use might exist within the broader framework of an existing private ownership, or be asking for ownership itself. Either way it raises the validity of the libertarian justification of private property in land. Sometimes, right and left libertarians would both agree, such use might be justified as redress or rectification for injustices in the past, either of transfer or of acquisition. Yet, besides such cases, no such use would be justified. The demands might be met or they might not; however, it is not a question of justice that they *should* be met.

Thus, as a matter of principle, demand (2) is not compatible with libertarianism. In consequence we can say that libertarianism as liberalism cannot accommodate the demands of the targetted groups. This is certainly one important, if perhaps hardly surprising, conclusion. What we cannot say yet is if the CJPOA is a product of liberal justice or not, for our exploration of the libertarian theory has been inconclusive. Demand (1) is compatible with

⁷⁷ See H. George, *Progress and Poverty*, (London, Hogarth Press, 1966), for his arguments on a land-tax which would affect those making money from land which they had done nothing to earn. See also A. Laurie, 'Monopoly Without Part Two', *Land Essays*, vol. 1, (Oxford, This Land Is Ours, 1996).

libertarianism; demand (2) is not. The CJPOA is both liberal and illiberal in criminalising these demands.

Libertarianism is about to be left since it has failed to accommodate both demands. However, if we pry a little further into the reasons for its failure to accommodate demand (2) we can begin to understand a possible answer to the second and related problem of the liberal or otherwise nature of the CJPOA. It is in this failure to accommodate demand (2) that we come up against the limits of the libertarian theory of property and conception of justice in general. All claims are dependent on the validity of property rights, a conception of justice which has two consequences. Firstly, you are outside justice if you don't have property rights. Thus excluded from justice are those without property rights, with the appropriate qualifications indicated above. Amongst the excluded are likely to be those groups targetted by the CJPOA. Certainly, it is not a matter of justice that they be included. Secondly, even if you don't have property rights in practice, your claims of justice still need to be made in terms of property rights, rights that you might morally be owed. To this extent it excludes claims that are not, or cannot be, made in these terms.

At the extremes these consequences may be seen quite clearly. The Tannehills entitle a chapter in a book, 'Property - the great problem solver'; their solution to the problem of the dispossessed is particularly pertinent in the present context. The abolition of public lands would allow these dispossessed to homestead on these lands. Those people not willing to invest in property would be pushed 'to the geographic edge of the society.' In such a utopia, 'One can't sleep on park benches if the private owner of the park doesn't permit bums on his property; one can't search the back alleys for garbage if he is trespassing on alleys belonging to

a corporation; one can't even be a beachcomber if all the beaches are owned. With no public property and no public dole, such undesirables would quickly "shape up or ship out".⁷⁸ Much might be said about this passage. However, limiting myself to the two consequences of the libertarian emphasis on property rights indicated above: (1) those without property are pushed to the 'geographic edge' of society; (2) these people can only come in from the margins if they express their claims in terms of property rights. Most significantly, those who do not are 'undesirables'. They are ways of life which cannot be accepted within such a society. We come back to this point at the end of the chapter.

Nor, of course, are these problematic consequences limited to the extremes, though they may be more explicit here. The detailed treatment of at least two accounts of libertarianism attempted to point to problems with its conception of justice. Steiner's theory, as explored in the previous chapter, overtly aims to address the problem of conflict, or how to accommodate various conflicting demands. His answer is a theory of justice defined by a compossibility of property rights. Such a compossibility cannot include those who have no claims to property, or those who do not articulate their claims through property.⁷⁹ But libertarianism in itself, as has already been said, does not hold any great further interest for us. It is not compatible with both the hypothetical demands. Rather its importance lies in what these conclusions might have to tell us about the welfare liberalism compatibility.

78 M. and L. Tannehill, *The Market for Liberty*, (New York, Laissez Faire Books, 1984), p.61.

79 See Steiner, *An Essay on Rights*, ch.6, for an extended account of how his libertarian account of justice may deal with adversarial circumstances.

3.3 The welfare liberalism compatibility:

The welfare liberal theory of property was articulated very broadly. This broadness was deliberate, for it allows the greatest scope possible for a liberal compatibility with the list of hypothetical demands. This broad scope allows this theory to avoid the first objection to libertarianism above, that it limits justice to those with property rights. Nevertheless, it is not clear that it can avoid the second objection, in this context anyway, that all claims need to be made in terms of property rights, or more exactly property rights of a certain kind.

Now, this latter claim may seem peculiar, if not downright mistaken. It certainly needs some justification before we proceed. It is not to say that welfare liberalism, in contrast to libertarianism, can only articulate the claims of justice through property rights. For it seems quite clear that many rights do not have to have anything to do with property. The right to freedom of expression, to take a most obvious one, involves a duty of the state not to prevent the individual from free expression, wherever she is. It doesn't have to be, as Narveson would have it, the right to say what one wants on one's own property.

Furthermore, some of the targeted groups' demands could be expressed in terms other than property rights. In fact complaints to the European Court of Human Rights have been made in just these terms, that the CJPOA violates the rights to privacy, family life, freedom of expression and assembly. Nevertheless, to the extent that this problem has been presented as one of property, and therefore the demands have been articulated as demands for property, then it would be fair to say, as we shall see, that liberal property rights are limiting.

To go back to the first objection: the welfare liberal theory might at least take some account of the targeted groups' demands. An interest theory of property justifies private property insofar as it protects and establishes whatever interest is deemed important. The private landowners' rights protected in the Act are therefore justified in this manner. Similarly the rights of those who want access to and use of this land. Now, as the problem has been put this second set of rights also need to be property rights, broadly conceived as explored in the previous section. Since two parties may both have interests in the same piece of land an impossible set of rights seems inevitable. However, this does not mean that the rights of one party are to be dismissed altogether. Though a compossibility of rights may not be possible there may be ways, other than the libertarian which, as we have seen, comes at such a cost, of avoiding conflict.

Waldron suggests a way of conflict resolution applicable to at least some rights disputes based on Raz's interest theory of rights.⁸⁰ Raz talks of 'the dynamic aspect of rights'.⁸¹ By this he means that there is no closed list of duties which correspond to any right; they vary with historical circumstances. Therefore for any right there may be more than one duty. X's duty to provide health care for Y involves a duty not only to provide the immediate resources for this, but also to train health professionals for the future, improve environmental and industrial conditions, educate people about health care and set up research programmes about health. Similarly her duties towards Z to provide education may encompass an equally wide range of activities. Thus she might decide to spend the immediate resources on Y but this would not

⁸⁰ Waldron, 'Rights in Conflict', *Liberal Rights*, (Cambridge, Cambridge University Press, 1993). There may, of course, be different kinds of rights' conflicts for which this model would be of little use. B and C's rights to life may be in conflict if they are both drowning and I can only save one of them. There seems no way in which my saving A can be made up to B in that I owe her some other duty. In such cases, Waldron suggests, we can do little more than use quantitative balancing, p.223-24. Such a conflict may be avoided altogether, as the libertarians avoid it, if the right to life is not regarded as a positive right. Rather we simply have the negative duty not to interfere in some other person's life.

⁸¹ Raz, *The Morality of Freedom*, p.171.

absolve her of her duty to train future teachers or to set up research commissions. Thus to return to Steiner's talk of domains, Y and Z's domains both include the scarce resources that X has at hand. Their domains cross over and they are impossible simultaneously. But this absolute impossibility is unlikely to mean the straight outweighing of one set of duties by another. Neither does it invalidate either of their claims to these resources. If Y gets them rather than Z, the latter's claim to them still remains valid, meaning he is entitled to the resources next or some form of compensation, even if just an apology.

But this still does not answer the question of how X is to decide between Y and Z in terms of immediate action. Say she has a hundred pounds, enough for a life-saving operation for Y or a year's education for Z. Waldron might attempt to answer this dilemma by looking at which duty is more internally related to the interest upon which the right is based.⁸² The right to health care is based, it could be argued, on the interest we have in physical and mental well-being, so the duty to perform a life-saving operation is clearly internally related to this interest. The right to education is, say, based on the interest we have in our own personal growth and allowing everybody equal opportunities. Here the duty to provide education for a year is not internally related to the interest since this interest will still be served even if Z, unfortunately, misses a year of education. Of course this approach will not work with every conflict. It would be a different matter if X has to decide between a life-saving operation and a lifetime's education. Here some other method of deciding the conflict, utility maximisation, lexical prioritisation, or moral judgement, would have to be employed. But the above approach can still sometimes work.

82 Waldron 'Rights in Conflict', p.220-23

A final point needs to be made as regards this theoretical model. Raz argues that on occasions conflicting considerations may override the interest on which the right is based, in which case we might say that the core right exists, but not some of its possible derivations.⁸³ Freedom of expression may be a general right with its derivations the freedom to talk in public, the freedom to wear the clothes you want and so on. It might occasionally come into conflict with other considerations, say the right against the incitement of racial hatred. Here the freedom to publish racist journals may be prohibited but the general right to freedom of expression still exists.

With this model in place we can return to the hypothetical demands.

Demand (1): as we saw in the discussion of the libertarian compatibility, this demand is derivative upon the prior rights of property holders. If they consent to it, then there can be no problem here. There need not be a conflict of rights at all so the above model would not come into action. There is then here a compatibility between the demand and liberalism.

Demand (2) (Interpretation A): Taken as the general right to property, this right might be met by the interest theory of property if it could be argued that there is some general interest in having property. Taken seriously as regards land this right would mean a massive redistribution of land so that everyone had the amount required to serve their interests. There is a possible accommodation of the demand here, though whilst this course might solve the problems of squatters for example it is arguable that it does little to address the real interests of travellers and protesters which are not for little patches of privately owned land but rather

⁸³ Raz, *The Morality of Freedom*, pp.183-4

for access to some or all land.

Interpretation B: So again, as with libertarianism, we can turn to the narrow interpretation of this demand, one that argues for rights of access to and use of land, within some wider framework of ownership, rather than for ownership of the land itself. In this sense a possible conflict of rights is posed. One scenario, is that the property rights of the private landowners are not in line with the interest justification of private property. In this case, as with the libertarians, some redress is in order. The libertarian account stops here, with the consequent problem of the exclusion of certain demands and groups of people from their realm of justice. For an interest theory it can go further, for even if the rights of the landowners are just other claims may be allowed. They will not be exiled beyond justice. In this regard it marks a significant advance on libertarianism.

How this balancing of rights might take place in practice obviously needs some careful working out. Nevertheless, on the Raz/ Waldron model presented above some sort of accommodation of both sets of claims may be possible. The duties to landowners and travellers, for example, may seem impossible since they involve the same extensional description, or piece of land. Yet the rights of ownership could essentially be respected, whilst allowing travellers limited access to this land.

3.4 Liberal justice?

This analysis of the compatibility of the hypothetical demands with the two theories of property may not appear to have concluded quite as expected. To sum up on this discussion:

(1) The libertarian defence of private property is not compatible with the demands of the targetted groups. Whilst it may accommodate demand (1), it could not accommodate demand (2). Therefore we can reject it as a way of structuring a resolution between landowners and the demands of the groups that are legislated against in the CJPOA. However, its accommodation of one demand and rejection of the other means that we come to no conclusion in our enquiry as to whether the CJPOA, in proscribing these demands, may be properly described as liberal justice. (2) Welfare liberalism can accommodate both of the hypothetical demands of the targetted groups. This accommodation sits in an even greater apparent contradiction of my espoused claim in chapter to show that the CJPOA, in legislating against these demands, is a product of liberal justice.

Much of the rest of this thesis takes up the argument that this contradiction is only apparent. Focus is now on welfare liberalism; libertarianism has been found incompatible with the demands taken as a whole. However, our discussion of it may still inform our further explorations into the apparent contradiction between welfare liberalism's accommodation of both demands and the claim that the CJPOA is a product of liberal justice. To begin this argument I want to make, and explore the connections between, two claims, one empirical, the other theoretical.

Claim (1) is, as has already been noted, that the CJPOA, in preventing certain consensual activities taking place on land, is aimed at excluding certain social groupings from that land. This targetting will be considered in greater detail in later chapters. It is, however, for the moment worth noting how it is not limited to the CJPOA, but is linked to a whole partial agenda of development. Monbiot notes:

'the erection of farm buildings requires no more than a nod and wink from the local authority. By contrast, if people such as gypsies, travellers and low-impact settlers, people from somewhat less elevated classes than those to which many country landowners belong, try to get a foothold in the countryside they find they haven't a hope. It doesn't matter how discreet their homes are; it doesn't matter whether, like Tinkers' Bubble they actually enhance environmental quality rather than destroy it - they are told the countryside is not for them. You can throw up a barn for 1,000 pigs with very little trouble, but trying living in a hole in the middle of the woods, and you'll find the hounds of hell unleashed on you.'⁸⁴

Claim (2) is that the liberal property relation excludes certain interests. This claim is less straightforward than the first. It takes us back to the criticisms levelled at libertarianism earlier in this section. Libertarianism, it was argued, could not accommodate both demands of the targetted groups because its conception of justice limited justice to those with property rights and all claims within this system of justice had to be articulated through property rights. Now, welfare liberalism can extend justice to those without property rights; equally claims within this extended system of justice are not limited to claims of property rights. Nevertheless, insofar as these claims are expressed in terms of property rights the liberal property relation is a limiting relation.

One way in which it may be limiting is that it is an instrumental relation. The nature and significance of this instrumentality will be explored at greater length in the concluding chapter. In brief though, in the particular context of property in land, it is a relation which by objectifying the land separates us from it. The land is made a means to serve the ends of the human subject. Most obviously we see this in economic justifications of private property in

⁸⁴ G.Monbiot, 'Land reform in Britain', *Resurgence*, 181 (March/April 1997), p.7. For greater details on how planning law in the countryside seems to promote the interests of only certain groups see G.Monbiot, *A Charter for the Countryside*, (Oxford, This Land is Ours, 1995) and S.Fairlie, 'Zoning out the Peasants', *Land Essays*, vol.1, (Oxford, This Land is Ours, 1996), who points out that smallholding in Britain is actively discouraged by the fact that you have an unconditional right to put up agricultural buildings only if you own twelve or more acres of land.

land,⁸⁵ but the justifications considered in this chapter are also instrumental in that property in land is justified precisely because it structures negative liberty or certain general interests.

There are other, closer ways of relating to the land. It is these interests which may be excluded from the apparent compatibility between liberal property and the hypothetical demands, since the compatibility is limited to the instrumental property relation.

Bruce Morito, in an essay on how Native American claims may be misrepresented in the Canadian system of justice, points exactly to how the Native American relationship with the land may not be accommodatable within a western liberal discourse of rights. The former's commitment to identity with the land is hard to understand within the framework of a system underwritten by an axiological separation between humanity and the rest of nature.⁸⁶ In this context, 'The frame of reference required for understanding Aboriginal claims seems so different from that of the political/legal status quo that communication of the claim appears impossible'.⁸⁷ Thus, so the argument proceeds, the use of a rights-based liberal account of justice by the Native Americans in their negotiations with the Canadian government, represents a conciliatory move by them which may be misrepresenting the points they are attempting to negotiate.

We can now put these two claims together: there is the exclusion of certain social groupings in the CJPOA, an exclusion that on the face of it seems illiberal. But there is also a possible exclusion within liberal property theory. Or, to put it more exactly, liberal property theory cannot accommodate all interests. In other words, there may be an apparent compatibility

⁸⁵ For example, see H. Demsetz, 'Toward a theory of property rights', *American Economic Review*, 57 (1967). He argues, p.354, that 'property rights arise when it becomes economic for those affected by externalities to internalise benefits and costs'. More generally see R. Ellickson, 'Property in land', *The Yale Law Journal*, 102 (1993).

⁸⁶ B. Morito, 'Aboriginal Right: a conciliatory concept', *Journal of Applied Philosophy*, 13 (1996), p.127.

⁸⁷ *Ibid.*, p.125

between liberal justice and the claims of the targetted groups, but this is a compatibility which can only exist by excluding certain interests. My suggestion is that these two exclusions are very similar, a suggestion which takes some argument, carried out in the next three chapters.

Morito however, might give us a start. He comments that the Native Americans' relationship with the land may, in the context of a liberal system of justice, make them appear as 'savage simpletons'.⁸⁸ Thus their exclusion through liberal property theory is as savages. As such the targetting of legislation against them becomes a great deal easier.

I am not trying to say that the groups targetted by the CJPOA are similar to the Native Americans. They may or they may not be; that is not important here. What is important is that they are targetted by the CJPOA and that liberal property theory may exclude certain interests. Thus they may be targetted as savages due to their being outside liberal property theory.

The next three chapters of this thesis explore this possibility. Moving beyond liberal property theory to a liberal theory of justice as a whole they argue that this exclusion as savages is not just incidental to liberalism but buried at the heart of its theory; note how this conclusion allows us to understand the CJPOA as liberal justice.

Conclusion:

These arguments are, however, ones to be had in future chapters. This chapter has been a long

⁸⁸ Ibid., p.125

one that has covered much theoretical ground. Despite this length its conclusions as regards the CJPOA as liberal justice are uncertain.

We may be certain that libertarian property theory is not compatible with both of the demands of targetted groups. This does not mean that the CJPOA, in proscribing these demands, is libertarian liberal justice. As it stands it would appear that it is not, since libertarianism would accept one of the demands.

We might carry on with our discussion of libertarianism in this regard. However, the fact that it is not compatible with both demands is a significant conclusion. At least we can say that it cannot provide a solution to the problem that has been posed. Further exploration of welfare liberalism's capacity to properly accommodate these demands will give us a certain understanding of the CJPOA as libertarian liberal justice. This is not an argument that is had in this work, in part because of ways specified above, libertarianism has played out its role in our analysis of liberal justice through the CJPOA, and in part because the arguments in the next chapters directed at welfare liberalism may be equally applicable to libertarianism. They concern the subject of liberal justice which, it was argued in chapter two, is common to both libertarianism and welfare liberalism.

So, whilst this chapter marks the end for our consideration of libertarianism it merely marks the beginning for discussion of welfare liberalism. The argument in the next two chapters changes tack. The possibility was raised at the end of the previous section that liberal property theory might exclude certain interests, and that this exclusion might be linked to the targetting of certain groups. Chapters four and five argue that this exclusion of interests is central to

liberal justice. Chapter six returns to the CJPOA and argues how this increased understanding of liberal justice allows us to see how the targeting of certain social groups in the CJPOA is definitive of liberal justice.

Chapter Four: The Self of Liberal Justice

Introduction:

The end of the previous chapter is a turning point in the argument of this thesis. It concluded our discussion of libertarianism, as incompatible with at least one of the hypothetical demands. In one respect the reasons for this incompatibility were obvious; libertarians cannot extend as a matter of justice, except in exceptional circumstances, rights to those without property rights. There may be reasons other than this one, reasons it may share with welfare liberalism's incompatibility with the demands, but incompatibility has at least been shown.

The focus now moves to welfare liberalism. In the discussion which follows this form of liberalism is associated closely with the work of John Rawls.¹ It is not immediately clear that this wing of liberalism is incompatible with the demands. Certainly, interpreted flexibly it may accommodate the interests of those without property. Such an accommodation is in contradiction of the intention here to argue that the CJPOA is an example of liberal justice. To argue for such a conclusion we need to show at least a non-compatibility between the welfare liberal theory of property and the hypothetical demands. This non-compatibility is not enough on its own to show that the CJPOA is liberal justice - as yet it cannot be claimed that the Act is part of a libertarian liberal justice, though libertarianism is incompatible with one of the demands - but it must be a necessary part of this argument.

¹ The terms of description here are essentially unimportant. Welfare liberalism may include a wide range of views. It is used here in order to indicate at least a significant difference between certain views and libertarianism, most particularly in this case the capacity to accommodate the demands of those without property.

The argument is not a simple one. It is important to outline here where it might be going, since it is not completed until the end of chapter six. In the conclusion to chapter three it was noted that liberal property theory might not be able to accommodate some interests conceived in a particular way, in this case non-instrumental relations with the land. If it cannot, this would indicate an incompatibility between welfare liberalism and the hypothetical demands as conceived in this non-instrumental way. This incompatibility is not argued for further here.² It represents a possibility, an opening, that liberal justice cannot accommodate the hypothetical demands. Without this possibility, this work may have to end here, since compatibility with the demands would indicate that the CJPOA, in opposing these demands, is not liberal. So it is a possibility that is left open. This chapter and the next situate this possible exclusion of interests within a wider exploration of exclusion in liberal justice as a whole. Thus this exclusion of non-instrumental interests is established as typical of liberal justice. Chapter six argues that these exclusions may be aimed at specified social groupings. If this is the case we might understand the targetting of certain ways of life in the CJPOA as appropriately liberal.

The discussion of exclusion in liberal justice in this chapter and the next takes as its focus the conception of the subject which, it was suggested in chapter two, is common to different accounts of liberalism. Recall that this self or subject of liberal justice was minimally characterised by its ability to rationally pursue and review conceptions of the good life. This chapter considers this self in greater detail. It also begins the process through which it is argued that the liberal self is produced in opposition to other possible selves, therefore showing how conflict, or the production of opposition, is central to liberalism. Through this argument we might come to understand the CJPOA as part of this process of conflict

² Non-instrumental relations with the land are articulated in chapter seven.

production.

The focus for this discussion of the liberal self is the work of John Rawls, in part because his influence has been so great, and in part as a way of keeping this focus tight. In this chapter the contentious nature of this Rawlsian self is revealed, at least in part, through a contrast with Locke and Hayek. As we shall see, the latter is particularly important because he has been explicitly critical of Rawlsian-type constructivism. In consequence, it may be argued, Hayek is excluded from accounts of liberal justice in a way that prepares us for the exclusion of certain social groupings from liberal justice. These latter exclusions are explored in chapters five and six; this chapter concentrates on exclusions within liberal theory.

In order to accommodate this broadening of discussion the concept of jurisprudence is brought into play. Questions of the nature of the law inevitably overlap with questions of justice, though their exact relation is of course a matter of dispute and discussion within jurisprudential thought. My aim is hardly to address these issues, though it is by pointing to them and arguing where Rawls and Hayek respectively stand in relation to them, that we can come to understand a body of jurisprudence, or at least one version of such a body, in which Rawls is included and Hayek is excluded.³

³ Unsurprisingly, this discussion of law is very selective. In particular it ignores, (1) the positivist approach to the law, embodied particularly by theorists such as Kelsen and Hart. However, their analysis of the law is open to very much the same criticisms as the justice-based approach that I consider. By setting out a concept of law a defined area of the law is created against which the non-legal is set. Part of the definition of law is then what is not law. It is in this 'not law' that we will find possible answers to the conflicts that liberalism seems to inevitably produce. It also ignores, (2) the importance of welfare law. In practice, to put it broadly, the law today in Britain may be divided into two main categories. There is the classical liberal law which delineates spheres of autonomy in which people can pursue their own ends. The law against harm to the person would clearly be of this type. There is also what might be called social law which seeks to further substantive ends of particular people. The law of the welfare state is law of this kind. It is on the former that I propose to focus in my discussion here of liberal law since it is these spheres of autonomy that appear to be violated by section 5 of the CJPOA.

1. Locke, reason and God:

Once, or so a story goes,⁴ there existed homogenous communities with shared values. Law would have been an expression of these values. At some point such communities with shared values broke down, to be replaced by societies of mutually competing individuals. Law, rather than articulating shared values, becomes a means of arbitration between these individuals. The device of the social contract in Hobbes and Locke becomes a way of articulating what the law should be in a world of individuals with competing political and moral ideals. In Hobbes, we see individuals surrendering up their natural rights to a sovereign as a way of ensuring peace and security in this value-competitive political society. But it is in John Locke that we see more properly an early articulation of liberal law. To add some more historical detail: his political and legal theory may be seen as an attempt to provide the theoretical foundations of a new legality in the context of the break-up of the feudal system which left a power vacuum open to exploitation, and most especially tyranny. With the bonds of feudalism gone the newly created free individual became vulnerable to the power of the state. More immediately Locke's Two Treatises of Government was written at a time of political crisis in the 1680s with the threat of absolute monarchy. In other words the ending of feudalism led to an increase in state power, which towards the end of the seventeenth century looked likely to fall into the hands of one man. Locke formulated a theory of resistance to such a possible abuse of power in terms of natural rights. So we can see that the central political debate of the day was fought in the language of individual rights, Hobbes arguing that we should surrender these to an absolute monarch, Locke that they are our protection against absolutism. Rights, wherever one lay on the political spectrum, had become the new language of the legality needed for the new

⁴ See C. Douzinas and R. Warrington with S. MvVeigh, Postmodern Jurisprudence, (London/New York, Routledge, 1991), pp.3-6, for greater detail on this transition as it effected the law.

political order.⁵

Locke's rights are those to life, liberty, property and self-defence and they exist before and independently of government in a state of nature.⁶ In this state, people are equal insofar as they are possessors of these rights.⁷ Political society is set up for the protection of these rights, for although free in the state of nature people's freedom is constantly under threat.⁸ If the state abuses the powers given to it by consent it is deemed unjust and can be resisted.⁹ Thus the right to self-defence existing in a state of nature becomes the right of resistance to tyranny in political society.

Now such a theory of the limits of state power, even if presented in an admittedly abbreviated form, is not going to provide us with detailed knowledge of the laws of that state. What it does do, however, is provide the basic principles on which such laws should rest. People enter political society 'with an intention in every one the better to preserve himself, his liberty and property'.¹⁰ So, insofar as the state exists for the preservation of certain basic rights, the law should enforce the security of these rights against other individuals and against the state. We see here the beginnings of the classical model of liberal legality as a system of general rules delineating spheres of individual autonomy in a society of mutually competitive individuals.

As suggested earlier, this conception of the individual was part of the historical transition from

5 There were those who were not impressed with this emphasis on natural rights. For example Edmund Burke, Reflections on the Revolution in France, ed. C. Cruise O'Brien, (Harmondsworth, Penguin, 1968), provides a scathing critique of the 1789 revolution and its proclamations of universal rights, arguing that such neglect for the institutions of tradition could only lead to tyranny. In a sense, of course, he was proved right.

6 Locke, Two Treatises of Government, p.120

7 Ibid., p.118. Locke notes that there could be 'nothing more evident' than such equality.

8 Ibid., p.179

9 Ibid, p.225

10 Ibid., p.182

communities with shared values to ones with competing ends. In consequence of this transition the law becomes, not a matter of promoting the common good, but of ensuring maximum freedom for each individual, taking into account the extent of other people's freedom. As Barron points out, the law becomes the expression of a rational order rather than of a factual state based on some common conception of the good.¹¹ Equally, the subject of the law, the individual, becomes defined by rationality. Again Barron: 'Reduced to its essence, the self is pure rational will, possessed of a capacity which establishes its equivalence *vis-a-vis* other selves, and which explains and makes possible the apparently irreducible diversity of the social order'.¹² It is only through the definition of the self as rational will that allegiance to the law as rational order can be guaranteed. At the same time it is as rational selves, with the capacity for autonomous action, that the law conceives us, in its role as arbiter between rationally chosen ends. So it seems that the law postulates a certain conception of the self to sustain its own legitimacy. This self is not then a 'natural' self but one employed for a particular social purpose.

We see how the conception of the self of liberal justice may be a controversial one. Locke's differences from Rawls, as we shall see, are particularly important in this regard. Certainly in Locke there may be seen a naturalisation of this self if we consider the basis for these rights that the law should seek to uphold. Locke's theory is importantly influenced by his religious convictions; the foundation of rights lies in natural law which is discernible by reason: 'The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no

11 A.Barron, 'Legal discourse and the colonisation of the self in the modern state', *Post-Modern Law*, ed. A.Carty, (Edinburgh, Edinburgh University Press, 1990), p.110.

12 *Ibid.*, p.110. Barron goes on to argue that liberalism's theorisation of the self as rational and creating, or at least discovering, its own laws, obscures the extent the individual is the object of the state's disciplinary power. This line of argument is explored further in chapter six.

one ought to harm another in his life, health, liberty or possessions."¹³ To put it another way, it is through reason that we are able to discern God's law. So, again, it is as rational beings that we are able to recognise and subjugate ourselves to the law; equally it is through reason that we recognise the benefits to be gained from enshrining the natural rights of nature in the positive laws of the state. And since it is through reason that we grasp the laws of nature or God's law, it is as rational beings that our natural status is defined.

The subject as rational lies at the very heart of Locke's constitutional theory; since it is through reason that our natural rights are known, it would seem to be reason that defines us as abstractly equal individuals before the law. This fact of equality is also central to liberal legality. It is what makes it possible, for without equality there would be reason to ignore the ends of some people. It also leads towards its universalisation. Liberal law, as the expression of equal rational subjects, must become the basis of all law. Locke confirms this drive towards totalisation: The 'municipal laws of countries' he tells us 'are only so far right as they are founded on the law of Nature, by which they are to be regulated and interpreted'.¹⁴

The influence of Locke's theory can be seen in the American Declaration of Independence¹⁵ and the Declaration of the Rights of Man and the Citizen of the French Revolution. To take the latter: again the development of the liberal doctrine of rights¹⁶ should be seen against the backdrop of the collapse of the old system of certainties in the form of the ancien regime. The

¹³ Locke, *Two Treatises of Government*, p.119.

¹⁴ *Ibid.*, p.123

¹⁵ This Declaration ought to be considered in the context of the discussion of the US claims to original property rights in America in the last chapter. Such claims were only sustainable through the exclusion of the claims of the Native Americans. Thus we see how exploitation is hidden behind the grand rhetoric of the rights of man.

¹⁶ Though it should be noted that this Declaration lays great emphasis on the duties of citizens as well as the rights of individuals (see the preamble to the Declaration in Waldron, *Nonsense Upon Stilts*, (London, Methuen, 1987), p.26), revealing the influence of Rousseau as well as Locke.

Declaration was expressly intended by the National Assembly as a preface to the new constitution articulating the general principles on which this would be based.¹⁷ Furthermore these would be the principles on which any constitution and any system of laws should be based.¹⁸ So, the tendency towards universalisation inherent in liberalism is displayed in practice. Assuming that it has found some natural basis for the possession of rights for initially equal subjects, it then proceeds to use this postulated self as a means of judging the constitutions of other countries. The road towards this universalisation is essentially the same as Locke's, if understandably less articulated. The liberal core of the Declaration would appear to be in article 4 which asserts that 'Liberty is the capacity to do anything that does no harm to others. Hence the only limitations on the individual's exercise of his natural rights are those which ensure the enjoyment of these same rights to all other individuals.'¹⁹ Law's task is to establish these limits. It acts between individuals constituted as free to choose their own ends, and as such, rational choosers. As rational choosers they are equal, thus grounding the possibility of a legality in a world of mutually competing ends, for each end is equally valid. It is but an easy step for this equality as rational subjects to then transcend the borders of particular political societies. The preamble to the Declaration says that it contains 'the final end of all political institutions'. But it is important to note the differences with Locke. Whilst Locke's rights depend on the purposes God has for people, God is missing from the Declaration. Instead, people have become the basis of rights. There is something to be discovered about how our relations with each other should by nature be. With the death of god, people discover their own law, but it is a law which is in some sense there, not created by people themselves. So reason's role is again to recognise this fact; it is not absolutely

17 Ibid., p.22.

18 Ibid., p.24

19 Ibid., p.26

autonomous yet.

2. The self making its own law:

Rawls, on the other hand, presents a self which both necessitates liberal justice and *creates* it. Rawls' work is commonly seen as falling into two phases, with his later writings being at least a clarification if not a revision of the position taken in A Theory of Justice. In the context of the present discussion the details of this transition in the face of his communitarian critics is not of great importance.²⁰ The form his ideas take as a whole is what is of concern here. Nevertheless, there does seem to be a distinct change of emphasis between the two periods of Rawls' work. Galston suggests that whilst the main subject matter of A Theory of Justice is distribution, the focus in later work is, as pointed out in the opening chapter, 'on forging a meaningful and usable political unity in the midst of ever...increasing social diversity.'²¹ Since it is the latter which is of most interest here I do largely follow this division, presenting the principles of justice elicited in A Theory of Justice, and then concentrating on how these might be applied in a society liable to conflict, referring mainly to Rawls' later work. So unless it is obviously otherwise, I am working within Rawls' major clarification in his later work, that his liberalism is a political and not a comprehensive doctrine. The political conception of justice has three characteristic features, important to specify since they will be returned to: (1) its subject is the basic structure of society; (2) it is presented as a freestanding view though it is important that it can be supported by an overlapping consensus of comprehensive views; (3) it is expressed in terms of fundamental ideas which are implicit in the public political culture of a

²⁰ Mulhall and Swift, Liberals and Communitarians, chs.5 and 6 give a detailed account of the development of Rawls' thought in the face of this critique. Their criticisms of the Rawlsian self are explored here briefly in the chapter seven.

²¹ W.Galston, Liberal Purposes, p.142

democratic regime.²²

For our purposes the central part of his theory of justice is the generation and formulation of basic rights and liberties. These are selected through the hypothetical original position, though this use of a contract is only part of a wider argument from reflective equilibrium. In this context both parts of the argument raise similar issues as regards the self that is appealed to and underlies these arguments.

The original position is too well-known to need detailed consideration. The parties to this quasi-contract are behind a veil of ignorance. That is, they do not know what their position in society will be nor their conception of the good life. They know only that conceptions of the good life are plural; they also have knowledge of the general laws of society and of the various primary goods which they will require if they are to live rational and autonomous lives. From this position Rawls selects his two principles of justice, including the protection of basic rights and liberties.²³ Here we have the core of Rawlsian liberalism in practice; because conceptions of the good life are plural and because each person's essential interest is in leading a good life, it is not for the state to dictate what the good life should be. Rather the state's role is to provide the structure (by protecting basic rights and liberties) in which each person can pursue their own good life.

So, what we have at the basis of Rawls' theory of rights is, at least, a conception of the subject as a rational agent making autonomous choices. It is because this freedom to make choices about the ends of one's life is so important that the state through its laws shouldn't dictate

²² Rawls, *Political Liberalism*, pp.11-14.

²³ See Rawls *A Theory of Justice*, pp.60-61, for a provisional presentation of these principles.

what these ends should be (by proscribing all but one religion for example) but rather should merely create the conditions which in a social setting make the pursuit of any good life possible, as long as this doesn't interfere with other lives.²⁴ Yet, as Rawls recognises, the self as rational is not enough to guarantee liberal justice. It may necessitate it but it does not guarantee it. Thus the self as reasonable is needed as well.

The rational applies to how the agent uses their powers of judgement and deliberation to reach their ends. But, Rawls argues, 'What rational agents lack is the particular form of moral sensibility that underlies the desire to engage in fair cooperation as such...Rational agents approach being psychopathic when their interests are solely in benefits to themselves.'²⁵ Therefore he makes a distinction between the rational and the reasonable. The reasonable has two aspects: (1) it is that which people have if they are willing to propose and live by principles allowing fair cooperation between people; (2) a willingness to accept the burdens of judgement, or the causes of disagreement between reasonable people.²⁶

These two complementary ideas of the reasonable and the rational are expressed together in the original position; the participants are rationally motivated but they are situated in conditions which express their reasonableness.²⁷ We have already referred to these conditions in the form of the veil of ignorance. To be reasonable, to be able to discuss and agree on principles of justice, is to be without those social and cultural attachments that define our own individual identities.

²⁴ It is important to emphasise here that it is not the freedom which is in itself important, but the ends at which this free choice is aimed. It is because these are so important that we must be free to choose our own, and be able to revise our choices. See W.Kymlicka, *Liberalism, Community and Culture*, (Oxford, Clarendon Press, 1989), ch.2, for more on these points.

²⁵ Rawls, *Political Liberalism*, p.51

²⁶ *Ibid.*, pp.49-58. Rawls lists the various burdens of judgement, 54-57.

²⁷ *Ibid.*, p.52

Now, it is important to point out that the reasonable is not derived from the rational. We are not reasonable because it is rational to be so. Rather they are both fundamental ideas. If the reasonable were derived from the rational the structure of my argument would be very different, since, as shall be seen, it explores an opposition between the reasonable and the unreasonable. With the rational fundamental, this opposition would in fact be one between the rational and the irrational. Rawls is quite clear about their independence: justice as fairness 'does not try to derive the reasonable from the rational. Indeed, the attempt to do so may suggest that the reasonable is not basic and needs a basis in a way that the rational does not. Rather, within the idea of fair cooperation the reasonable and the rational are complementary ideas.¹²⁸ Putting the reasonable and rational together we have a conception of the individual in the original position as regulating the pursuit of their ends through a desire to justify these actions to others.

The characterisation of these parties to the original position forms the central focus of discussion of the Rawlsian self. Nevertheless, it is important to at least point to the place the original position has in Rawls' overall argument, and how this overall argument involves the same conception of the self. For the original position cannot on its own provide a justification of the principles of justice that its parties select. As Rawls says, 'To say that a certain conception of justice would be chosen in the original position is equivalent to saying that rational deliberation satisfying certain conditions and restrictions would reach a certain conclusion.¹²⁹ The parties to the contract are characterised in such a way that they must reach the conclusions that they do; thus as a form of justification the original position has no power. Rather it is a way of modelling certain convictions that we hold about justice in a broader

28 Ibid., p.52

29 Rawls, *A Theory of Justice*, p.138

process of justification that Rawls calls reflective equilibrium.

Reflective equilibrium is the process by which the principles of justice may be justified to you and me. In essence it consists of the search for a fit between our considered judgements, a set of moral principles, and relevant background detail.³⁰ The nature of our considered judgements is of most interest here; they are 'simply those rendered under conditions favourable to the exercise of the sense of justice.'³¹ We have already seen the conditions deemed necessary to the deliberation of justice in the original position, the conditions of reasonableness. The use of considered judgements and the assessing of these judgements in reflective equilibrium are the actions of the reasonable person. The principles of justice are therefore justified to us as reasonable people. The original position is part of this greater justification; its conditions are created by you and me to test principles of justice.³²

There is also a third point of view on the principles of justice.³³ We have had the parties to the original position; we have also had you and me in reflective equilibrium. Finally, there are the citizens in a well-ordered society. In order for unity and stability to exist within a democratic society it is important that each reasonable comprehensive view endorses the political conception of justice, each from its own point of view. Rawls calls this an overlapping consensus of reasonable comprehensive views.³⁴

30 Ibid; pp.46-53 give a detailed account of this process.

31 Ibid., p.47

32 The exact role the original position has to play in reflective equilibrium may be a matter of debate. However, this is not a debate that need be of concern here since my aim is to explore the self which justifies and to which liberal justice is justified, rather than questioning this justification. For an angle on this question see R.Dworkin, 'The Original Position', Reading Rawls, ed. N.Daniels, (Oxford, Basil Blackwell, 1975), who argues that the original position serves as an intermediate conclusion in a deep theory arguing for a right to equal concern and respect.

33 Rawls, Political Liberalism, p.28, specifies these three points of view,

34 Ibid.; in particular see Lecture IV, 'The idea of an overlapping consensus'.

So these last two levels of argument appeal to the reasonable self, whether that is you and me thinking about principles of justice or more abstractly the citizens of a well-ordered society. Since my aim is to consider how this conception of the self is produced in opposition to other possible conceptions, I now leave the specifics of these two arguments, and return to concentrate on the conception of the self in the original position, which provides a suitable focus for an exploration of this production. In contrast to Locke, and to the French Declaration of the Rights of Man, this self creates its own laws. It is in our capacity as rational and reasonable choosers that we can all agree to laws that we can submit ourselves to. Rather than using our reason to discover the law of nature it is because we are reasonable that we can prescribe law for ourselves. With Rawls this conception of the self moves to the very centre of the generation of liberal law. Sandel aptly comments on the liberalism that follows from this Rawlsian self as 'perhaps the fullest expression of the Enlightenment's quest for the self-defining subject.'³⁵ It is by turning to Hayek that we begin to understand the controversial nature of this subject.

3. The importance of Hayek's exclusion

Much of this chapter so far has been a matter of necessary exposition. It is through a consideration of Hayek's views on law and justice, located within the broader context of jurisprudence, that we can begin to get a critical bite on the Rawlsian self. Recall that in the second chapter it was noted that the positing of a certain conception of the self at the basis of liberal justice significantly omitted Hayekian liberalism. This omission, it might be plausibly argued, merely shows that no account of liberalism can reduce it to common features. It is

35 M.Sandel, 'The procedural republic and the unencumbered self', *Political Theory*, 12, (February 1984), p.87.

argued here, however, that this omission may be constitutive of liberal justice. There is certainly a case to be made for such a position. In addition it prepares the ground for other similar ways in which the liberal self is constituted, to be explored in the following two chapters.

Discussion in this section takes place on two levels which it is important to distinguish from the outset since they might often seem to run into each other. Firstly, there are arguments concerning how Hayek's approach to law can inform us regarding the approach of Rawls. That they should is hardly surprising since Hayek is explicitly critical of the type of approach that theorists such as Rawls take to the law. These arguments might be called intra-liberalism arguments. The second level of argument begins to go beyond liberalism. It takes as its starting-point Thomson's claim that Hayek is excluded from most accounts of jurisprudence.³⁶ It moves to exploring how that which is informed by Hayek is involved in a process of self-definition against that which it is not, as instanced by the exclusion of Hayek. The position of Hayek in the discussion that follows moves between these two levels because it is *how* he informs on Rawls on the first level that he is excluded on the second level. It is important to see that the levels of argument are distinct, for bearing this difference in mind will help us to understand how the construction of the liberal self is dependent on an opposition, an understanding that can then be extended beyond liberal theory to problems in liberal societies.

Clearly, some introduction to Hayek's jurisprudence is needed before these more critical aspects come into play. This introduction is given in the early part of this section. Points concerning rationality and justice raised in this introduction are then used in a comparison with

³⁶ A. Thomson, 'Taking the right seriously: the case of F.A. Hayek', *Dangerous Supplements*, ed. P. Fitzpatrick, (London, Pluto Press, 1991), pp.69-70.

Rawls. This comparison lays the ground for how we might understand Rawls, and liberal law as a whole, more clearly and why on this basis Hayek is excluded from accounts of liberal jurisprudence. And it is the dynamic interaction between these two points which allows us to see how conflict in liberal legalities may be understood, for it is argued that the exclusion of Hayek parallels, and further informs, a whole process of exclusion taking place within liberal jurisprudence based on the rational and reasonable self. Thus we begin to understand how the exclusions in the CJPOA may be liberal.

3.1 Individual freedom and general welfare

The role of law for Hayek is twofold: (1) it provides the structure in which the individual is free to pursue her own choices, with due regard for the freedom of others, and (2) it promotes the general good. It is in the connection between these two points that we can begin to come to an understanding of Hayek's concept of law, its relation with justice and the role of jurisprudence in law.

To put it briefly, the general welfare for Hayek is not the aggregate of individual goods of the utilitarians but the preservation of the order which allows for the pursuit of a great variety of unknown individual purposes.³⁷ Laws are part of this order; they are involved in the coordination of individual goods.

To understand the importance that Hayek gives to the connection between the pursuit of

³⁷ F.A. Hayek, *The Mirage of Social Justice*, from *Law, Legislation and Liberty*, (London, Routledge and Kegan Paul, 1982), p.5. Hayek's relationship with utilitarianism is a somewhat confused one. Certainly though, there might be justification for seeing him as some sort of rule utilitarian, though he does explicitly criticise this school of utilitarianism.

individual ends and the general good we need to consider his views on the possible extent of individual reason and knowledge. In what Hayek calls primitive societies,³⁸ people can know all the relevant facts; they will share in the same concrete events and have a common set of objectives. And yet such societies remain primitive because the extent of what might be called their social knowledge largely corresponds with their individual knowledge. What has enabled civilised societies to become civilised, and in Hayek's terms survive the evolutionary struggle, is precisely this development of social knowledge which is far greater than the knowledge which any one individual can possess. Rules, and therefore the law, embody such knowledge: 'it is the utilisation of much more knowledge than anyone can possess, and therefore the fact that each moves within a coherent structure most of whose determinants are unknown to him, that constitutes the distinctive feature of all advanced civilisations.'³⁹

Furthermore, this fact of ignorance in the context of modern societies imposes limits on our capacity to be rational: 'Complete rationality of action in the Cartesian sense demands complete knowledge of all the relevant facts', such rationality of action being 'only such action as was determined by known and demonstrable truth.'⁴⁰ But, Hayek argues, we don't know all the facts upon which we act; therefore we do best to act according to rules which embody knowledge that we as individuals do not possess.

Hayek's conception of rationality is clearly crucial if we bear in mind Rawls' conception of the

38 See for example Hayek, Rules and Order, from Law, Legislation and Liberty, (London, Routledge and Kegan Paul, 1982), p.13. It is arguable that Hayek's use of such an epithet merely reveals how loaded his discussion is, in favour of 'advanced' societies or one's embracing the free-market. It is this assertion of a liberalism which is the main argument pursued against Hayek in the rest of this section. Furthermore, it might be construed as somewhat ironic that these advanced societies, which have won the evolutionary struggle, are at the moment in the process of destroying themselves through environmentally unsustainable policies. Contrary to Hayek, and as most accept, the answer to these problems seems to lie in intervention in the market.

39 *Ibid.*, p.14

40 *Ibid.*, pp.10-12

self as reasonable and rational, and it will be looked at more closely in the next section. For now it is enough to see that, as opposed to a certain reading of Rawls, Hayek does not think that there can be a subject which can be ontologically prior to her society and decide on rules for that society.⁴¹ Since there is no point from which to totally escape our own context, the idea of imposing a rational design upon society from without simply cannot work. He takes as his basic model the workings of the market economy which manages to coordinate the necessarily limited knowledge of each individual towards the common good, without a commanding intelligence or design. Under the free market a 'mutual adjustment of the spontaneous activities of individuals is brought about by the market'⁴²; similarly 'An understanding of that mechanism of mutual adjustment of individuals forms the most important part of the knowledge that ought to enter into the making of general rules limiting individual action'.⁴³ In practice this means rules that are general, certain and equal: 'The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place. The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions.'⁴⁴ Furthermore, because these rules 'provide fixed features in the environment in which he has to move' they do not limit individual freedom, but rather serve to structure it.⁴⁵

41 Certainly, taken on its own, the original position does appear to include this conception of the subject as ontologically prior to its society. Thus it does point to a real difference between Hayek and Rawls. However, as we have seen in our discussion of Rawls and will explore further later, the original position needs to be put in the context of a wider argument which does complicate any simple assertion of the ontological priority of the Rawlsian self.

42 Hayek, *The Constitution of Liberty*, (London, Routledge and Kegan Paul, 1960), p.159.

43 *Ibid.*, p.159

44 *Ibid.*, pp.156-7

45 *Ibid.*, p.153. Clearly, this idea that freedom is served by rules depends on the assumption that freedom can only be limited by a coercion which is the intentional design of some other person. It is in this way that commands may limit freedom since then one may be placed under the will of some other person.

Thus individual freedom and the general welfare are both served, tied together by rules, essentially through the idea of human ignorance and the fact of evolutionary survival.

Individual freedom is not in itself valuable but is valued rather insofar as it leads to the creation of societies which have survived against other societies. We can now look at the consequences of this connection for Hayek's characterisation of law.

Most centrally, Hayek makes an important distinction between rules and commands, with the significant difference between them lying in the fact that, as we move from commands to laws, the source of the decision on what particular action is to be taken shifts progressively from the issuer of the command or law to the acting person'.⁴⁶ In other words, commands assign particular ends to particular people whilst laws merely provide 'additional information to be taken into account in the decision of the actor',⁴⁷ in pursuit of their own chosen ends. Barry points out that the distinction between them is not a logical one, but rather one to do with their level of abstraction, or the degree to which they do not refer to specific actions and ends; laws become more like commands the less abstract they become.⁴⁸

It should be clear how this distinction pivots on the idea of individual ignorance. Commands may be possible in closed societies where the commander may have knowledge of all the relevant facts and therefore the ability to coordinate activity effectively, but such knowledge is not possible in more advanced societies. For commands make no use of the knowledge that the agent may have; the course of action is determined by the command. Following rules allows for the incorporation of the agent's knowledge. It follows from this distinction that

⁴⁶ *Ibid.*, p.150. Although Hayek favours a system of law largely defined by rules, as I go on to consider, he admits that a society needs some commands to function properly. For example officials need commands to enforce the rules of just conduct. See N.Barry, *Hayek's Social and Economic Philosophy*, (London, Macmillan, 1979), pp.88-89

⁴⁷ Hayek, *The Constitution of Liberty*, p.150.

⁴⁸ Barry, p.83

rules are negative restrictions whereas commands are positive proscriptions.⁴⁹ Commands specify certain ends that must be met (such as the obligation to attend church every Sunday), but rules merely restrict some of our possible actions that may interfere with the exercise of liberty by other individuals (such as right to religious freedom).⁵⁰ This characterisation of rules as essentially negative leads to a central aspect of what rules as law should be. They should be general and abstract, rather than specific and concrete; as such they are 'essentially long-term measures, referring to yet unknown cases and containing no references to particular persons, places, or objects.'⁵¹

3.2 Where's justice?

So much for how Hayek's concept of law is motivated by the connection between individual freedom and the general welfare, taking into account human ignorance, and how the laws that may make this connection effective may be characterised. What this discussion tells us little about (apparently) is justice; it is here that Hayek's theory becomes very interesting to us, because whereas for Rawls laws are founded on some deeper principles of justice (the principles of justice which are selected in the original position), thus founding jurisprudence, for Hayek it is in the nature of the law itself, or the law as it should be, that justice is to be found. As we shall see such a minimalist approach to justice raises difficult questions for a jurisprudence which conceives itself as the rational pursuit of universal truths about law.⁵²

49 Hayek, *The Constitution of Liberty*, p.152

50 The example here is chosen deliberately since it is not entirely clear, as will be discussed later, that Hayek's articulation of the law would necessarily preserve such freedoms.

51 *Ibid.*, p.208. This demand for generality and abstractness, along with Hayek's belief in evolution rather than rational design, leads Hayek to favour the common law rather than statute law. For the latter is likely to be directed towards specific ends, and thus take on the character of commands. It would be interesting to consider Hayek's possible views on the CJPOA in this context, as an example of statute law.

52 See Thomson, 'Taking the right seriously: the case of F.A.Hayek', p.69, for more detailed discussion on this point.

The relation between justice and law is intimate, though hardly undisputed. Clearly the law needs to be just. So we need to have an idea of how justice enters Hayek's theory of law. Unsurprisingly, however, the nature of the relation between justice and the law is a matter of dispute. Broadly, two camps might be distinguished here: the positivists following Hobbes who argue that there is no justice beyond the law, or in the words of Barry, 'questions of legal validity are logically separate from questions of moral worth',⁵³ and the natural law theorists who claim that the law should be built on pre-legal principles of justice. I argue here that Hayek falls uncomfortably between the two with significant consequences for liberal jurisprudence as a whole.⁵⁴

That Hayek would not want to align himself with either side is hardly surprising. The natural law approach implies an ability to abstract oneself from one's particular situation to decide on what justice should be, something that, as we have seen, Hayek's theory of knowledge explicitly denies that we can do.⁵⁵ Nor is he likely to say that justice simply is the law; as well as connecting justice to the will of an impossibly omniscient legislator, this would make the link between the law and liberalism too tenuous. In the end though, I suggest, he follows the latter course whilst claiming he is not.

Hayek's theory of justice is to be found in the meta-legal doctrine he calls the rule of law, a 'doctrine concerning what the law ought to be.'⁵⁶ It is a doctrine which focusses on the formal

53 Barry, p.78

54 Thomson, 'Taking the right seriously: the case of F.A.Hayek', p.83, suggests that it is Hayek's straddling of these two camps that has made him a difficult figure for jurisprudence to deal with.

55 This abstraction would not just involve the assertion of end-states of justice, but of procedural justice as well. As argued in the next section it is in this respect that Hayek is critical of Rawls.

56 Hayek, The Constitution of Liberty, p.205

feature of rules. Hayek's rules or laws must possess three main characteristics: as we have seen they must be general/abstract, thus not directed towards any particular person or end; they must be also be known and certain; and of equal application.⁵⁷ These latter two characteristics seem to follow easily enough from the discussion of Hayek's idea of law in the previous section. It is only if something is known and certain that it can form part of the knowledge upon which people act. Law as applying equally is intended to fill out the idea of generality since it is possible that a law may be general and abstract (insofar as it only refers to formal characteristics) and yet may still apply to people in different ways. But what is most significant here is Hayek's assertion that 'it is doubtful whether we possess any other formal criteria of justice than generality and equality'.⁵⁸

It is important to point out the ways in which Hayek attempts to distinguish his position from a positivist one, for he does share with positivists the belief that law is constituted by its formal structure, as indicated in the previous paragraph. Yet he disagrees with them that it is the law which determines what is just; rather justice is 'a guide for determining what the law is'.⁵⁹ Now there are two points to be understood if we want to see how Hayek believes his theory is different from the positivists, for it does seem that all he is prepared to point to are formal features of the law. Firstly, we do have what Hayek calls a 'sense of justice' which can inform us as to the justice of particular rules.⁶⁰ But as opposed to Rawls, Hayek does not think that this sense can be given theoretical expression.⁶¹ Secondly, and what is important in the absence of any articulable positive criteria of justice, we have the negative criteria of justice.

⁵⁷ *Ibid.*, pp.207-10.

⁵⁸ *Ibid.*, p.210.

⁵⁹ Hayek, *The Mirage of Social Justice*, p.48

⁶⁰ *Ibid.*, p.41

⁶¹ See C.Kukathas, *Hayek and Modern Liberalism*, (Oxford, Oxford University Press, 1990), p.70 for more discussion of this point.

Hayek argues that the positivists' mistake lies in assuming that since there are no positive criteria of justice there are no objective criteria at all, and therefore the just is the law. What they ignore is the possibility of negative criteria as objective. These allow us to eliminate what is unjust. And they are of course the criteria of generality and equality referred to earlier. Laws, to be just, must at least not refer to particular ends.⁶² It is such a test of justice which allows us to develop our present legal system in a non-arbitrary fashion.

Therefore Hayek's theory can be distinguished from a positivist position. However, neither is it very far from such a position, or at least closer in some ways that Hayek would perhaps like to think. The problem is that, as Kukathas points out, it is not clear that generality and equality, Hayek's negative test of justice, will always produce rules which are in line with liberal principles: 'If laws are expressed in general rules the individual, in many cases, need never be coerced for he will be able to foresee the circumstances in which he would be coerced and so avoid coercion.'⁶³ Consequently, religious freedom, to go back to the example given earlier, might be justifiably restricted under Hayek's theory. As long as the individual can foresee the ways in which her religious freedom might be restricted, such restrictions would be justified. Similarly, as Barry points out, rules can be general and still be discriminatory. Thus a rule forbidding the playing of sport on Sunday may be general in that it does not name any particular social grouping. However, it may discriminate against those people whose faith does not entail such a law.⁶⁴ Kukathas argues further that Hayek, in order to avoid certain such situations, assumes certain extra principles of justice without explicitly articulating them,

62 See Hayek, *The Mirage of Social Justice*, pp.35-44

63 Kukathas, *Hayek and Modern Liberalism*, p.162. Barry, *Hayek's Social and Economic Philosophy*, p.102, comments also on this point: 'It would appear that a proper protection for individual liberty requires a more substantive limitation on what a government can do than that contained in the requirement that rules be perfectly general and non-discriminatory.'

64 Barry, *Hayek's Social and Economic Philosophy*, p.92

shown particularly in his claim that legislation may be needed to correct the common law.⁶⁵

Such legislation would seem to indicate a knowledge of what may be just or unjust, beyond the purely formal requirements of the law, requirements which the common law to be reformed may possess.

In other words Hayek's negative test is not the objective test he would like it to be. So either he can admit that there is no objective test (the positivist line) or the negative test can be supplemented with other principles. It is the latter line that Kukathas criticises him for taking without properly acknowledging it, though it seems that Kukathas thinks this is the line that Hayek *should* take explicitly. Equally, Barry argues that 'moral notions, having been formally excluded at the front door of his legal structure, nevertheless creep in through the back.'⁶⁶

We may conclude that Hayek's theory is simply confused. However, there is a further, what seems to me, more significant possibility here. Hayek's articulated theory of justice cannot provide the basis for a liberal legality in the kind of way that other liberals, including Barry and Kukathas, would want it to. They want a law with foundations; Hayek does not give this; his law is finally asserted simply because it is that which has worked for market capitalism. His liberal principles are not ultimately founded. Their justification lies in their evolving out of a spontaneous order. This spontaneous order becomes the determinant of justice, just as the law is the determinant of justice for the positivists. What such a justification means of course is that liberal justice becomes relative to and contingent on this order, and since it is not entirely clear what the spontaneous order entails, any assertion of principles of liberal justice must

65 Kukathas, Hayek and modern liberalism, pp.157-8. See also Barry, Hayek's Social and Economic Philosophy, p.88, who comments on Hayek's 'collectivist and sociological interpretations of the common law'.

66 Barry, Hayek's Social and Economic Philosophy, p.96

remain only that - assertion.⁶⁷

4. A comparison of Rawls and Hayek

A significant claim has been made, that Hayek's theory is unfounded. With this significant claim in place, we can now go on to compare the theories of Rawls and Hayek and in particular the conception of the subject at the bases of these theories. The rest of this chapter argues that this claim might have significant consequences for liberal law as a whole, so it is important to draw a few threads together.

In the limited area of law that is being considered here, that broadly speaking of civil and political rights, Rawls and Hayek would have few significant disagreements.⁶⁸ So, we are not talking about differences about laws as they are proposed; rather the differences lie in the theories founding these laws. These differences are important if we want to understand liberal law as some sort of a whole, since, as we shall see, they may be more apparent than real, and thus are differences which inform the whole rather than indicating two distinct camps in liberal jurisprudence.

At the basis of Rawls' theory as discussed earlier is a conception of the self as rational and reasonable. The rationality defines the agent's motivation in the original position, which is rational pursuit of their own self-interest. To be reasonable is to enter into the public world, to

⁶⁷ Another angle on this argument may clarify the point being made. Haworth, *Anti-Libertarianism*, pp.120-128, argues that Hayek creates a problem for himself by admitting the need for at least some state intervention in the market, for this possibility raises the question of where to draw the line in such intervention. As a libertarian Hayek wants to draw it very soon but, Haworth suggests, there is nothing in the spontaneous order thesis which logically entails such a conclusion. In the end it is drawn without justification; we are convinced that there might be through a series of 'false inferences, slides and ambiguities', p.121

⁶⁸ Though they wouldn't agree by any means on questions of social justice.

be willing to propose and live by the terms of fair cooperation, or to affirm the principles of liberal justice that they have selected in the original position to live by as rational agents.

There are two lines of argument which may be had on the connection between the Hayekian self and the Rawlsian: (1) they may be regarded as significantly distinct; (2) they may be more significantly similar than is commonly argued, a possibility which has interesting repercussions for liberal legal theory, namely that the Rawlsian theory of justice, rather than being the outcome of some reasonable deliberation not defined by particular ends, shares with Hayek's account of justice a reliance on existing, particular social and economic conditions.

If we accept (1) which, on the face of it, seems the more plausible option, given the discussion so far on Hayek's theory of justice, we have to accept that Hayek's exclusion from liberal jurisprudence is based on a real distinction. However, I propose to argue for (2), suggesting that Hayek's exclusion is based on a created rather than real distinction. The rest of this chapter explores why we should accept (2) rather than (1).

So to a possible argument for (2). Thomson, as has already been noted, says that the most significant difference between Hayek's conception of the self and that of other liberals is that Hayek does not regard the self as ontologically prior to society.⁶⁹ Kukathas talks of the different conceptions of the individual underlying the theories of Rawls and Hayek; Rawls' individuals share common moral elements (essentially their reasonableness which the conditions of the original position specify) whereas Hayek's individuals are defined by exactly that which Rawls excludes, their particular social and historical ends.⁷⁰ So the Hayekian self is situated in and thus not prior to society whereas the Rawlsian self is. For Hayek 'mind is an

69 Thomson, 'Taking the right seriously: the case of F.A.Hayek', p.75

70 Kukathas, Hayek and Modern Liberalism, p.79

adaptation to the natural and social surroundings in which man lives and...it has developed in constant interaction with the institutions which determine the structure of society.⁷¹ The mind cannot be separated from its social context. More importantly this social context, and the rules as institutions which govern it, is in fact part of the mind, a following of practical consciousness which the individual may not be fully aware of.⁷²

To this extent the claims referred to above by Thomson and Kukathas seem justified. Thus approach (1) to the connection between the conceptions of the self in Hayek and Rawls, that there is a significant distinction between them, seems the better. However, to leave it at this would be to misrepresent Rawls. The Rawlsian self came under much fire after the publication of A Theory of Justice; the communitarians criticised what they saw as the impossibility of the self in the original position unencumbered by and prior to any of its social attachments. But as Rawls has since made clear in his move to an explicitly articulated political liberalism the conception of the self in the original position is not a metaphysical one but merely a political one.⁷³ More importantly this is a conception of the self that, as we saw in our earlier discussion of Rawls, is implicit in our own political culture. Recall that the original position is not some hypothetical contract which generates principles of justice, but is rather part of a wider argument in which you and I may decide on principles of justice through reflective

71 Hayek, Rules and Order, p.17. It is worth emphasising here, to avoid any confusion, that Hayek is very different to the communitarians. Yes, he certainly shares with them the idea that self is situated in such a way that any ahistorical and asocial rational viewpoint is impossible. But his conception of the self within this situated context is extremely limited, consisting only of people as economically self-interested. Therefore people are not constituted by their various ends as in communitarianism. And of course much of Hayek's work is dedicated to the rejection of community in the march towards the Great Society. D.Levy, 'Liberalism, politics and anti-politics', Critical Review, 3 (spring 1989), pp.340-41, interestingly suggests that Hayek's rejection of community lies in his historical roots as an Austrian at the heart of the Hapsburg Empire. Any appeal to community in such a heterogeneous empire could only have meant its disintegration.

72 See Hayek, Rules and Order, p.18 and also L.Dobuzinskis, 'The complexities of spontaneous order', Critical Review, 3, (spring 1989), p.248.

73 Sandel, 'The procedural republic and the unencumbered self', has famously described the Rawlsian self as the 'unencumbered self'. For general accounts of the liberal/communitarian debate see S.Caney, 'Liberalism and communitarianism: a misconceived debate', Political Studies, XL (1992), and A.Buchanan, 'Assessing the communitarian critique of liberalism', Ethics 99 (July 1989). The communitarian critique of the liberal self is taken up in greater detail in chapter seven.

equilibrium. Therefore the conception of the self in the original position is decided upon by you and me as embodying qualities that our political culture regards as essential in the discussion of justice. Far from being a self detached from its social attachments this is a conception of the self that is a product of them.⁷⁴ In other words, the Rawlsian self's difference from the Hayekian self is the consequence of a different reading of political culture, not the consequence of some ahistorical and asocial perspective. There is a difference, but it's important to see exactly where it lies.

I suggest now that even this difference is largely apparent. Let's return to Rawls' two aspects of the self. There may of course be a certain amount of forcing in this translation of the Rawlsian rational and reasonable self into the Hayekian conception of the self. Certainly we need to be clear about the different uses of the idea of rationality in the two theorists. For Rawls, as far as it is used to characterise the motivation of the parties to the original position, rationality involves the pursuit of ends in the most efficient way possible. For Hayek it means more than this narrow motivational definition. It involves, at least and as discussed earlier, a social structure constructed by reason based on knowledge which it is impossible for one person to have.

So to the self as pursuing her own ends in the most efficient way possible. It seems that on this limited conception of rationality, Hayek, far from differing from Rawls, has exactly the same conception of the self as rational, for it precisely because individuals pursue their own best interests without having an awareness of the interest of the greater good that the problem of justice as coordination arises. This idea of rationality need not involve success in reaching

⁷⁴ Mulhall and Swift, *Liberals and Communitarians*, suggest that Rawls' political liberalism is communitarian in its articulation of shared meanings in our political culture, p.201-205.

these ends; rather it is a way of characterising agents' motivation.

The self as reasonable, that it will conform to rules that she has prescribed for herself, is a more complex issue as regards Hayek. For this reasonableness involves an awareness of and separation from those rules which Hayek claims we do not always have. His criticism of constructive rationality rests on this point, and as suggested above he thinks that we often act in accordance with rules which we are not actually conscious of following. The Hayekian self does not then rationally, or Rawlsian reasonably, endorse the law.⁷⁵ And yet there may be an argument which casts doubt on this lack of rational endorsement.

There does seem to be, on the face of it, something rather odd about the *articulation* of a spontaneous order in which we often follow rules unconsciously. Its oddness comes from the apparent contradiction between the opacity of the spontaneous order and the attempt to express the value of this order. The spontaneous order thesis is, recall, that since our knowledge as individuals is so limited the rational design of a legal order is a misplaced ideal; instead we do better to submit ourselves to rules that have evolved without overall conscious design and of which we are not often aware. In short this is a claim for the evolutionary success of the spontaneous order.

Now, Dobuzinskis has pointed out that 'Just as natural selection has ceased to be completely natural since Darwin prevailed over himself and decided to publish The Origin of Species, as is today made abundantly clear by the new biotechnology, the success of the idea of spontaneous order could render self-organisation less spontaneous.' Following from this assertion he asks

⁷⁵ Not that this need be a criticism of Hayek, for we often follow rules of which we are not aware. Barry, Hayek's Social and Economic Philosophy, p.79, gives speech and grammar as one particularly obvious example.

the question: 'Can social actors still do spontaneously what they have learned to analyse as social processes, when these processes depend on their failing to realise the consequences of their individual actions?'⁷⁶ The argument here hinges on the word natural; Dobuzinskis assumes that it is quite clear what kind of processes it refers to. Yet the idea of the natural is a controversial and much appropriated one.⁷⁷ Therefore the awareness of evolution is part of its process. Equally there may be some awareness of the workings of the spontaneous order but this is part of that order.

Nevertheless, there is something significant to be had out of Dobuzinskis' questioning of the relationship between the individual and the spontaneous order. In Hayek's model the individual is at least partially unaware of the processes taking place. As subject it is bound up with the rules governing these processes so that it cannot see beyond them. But Hayek articulates at least some of the workings of the spontaneous order, thus implying a separation of the subject as able to understand it. He is no longer subject as involved in the spontaneous order. He in fact shows a remarkably clear grasp of this order. And as separated from it his support for it is a rational endorsement of its rules. So we see that at the bottom of Hayek's theory of the law is a rational, or Rawlsian reasonable, support of that law. But not only is Hayek displaying a rational attachment to a liberal legality, but he is doing so within a theory that has the self, including himself, as constituted by its ends, and thus unable to see beyond these ends to any universal moral and legal theory. In other words his is a rational endorsement of a particular social and economic order as well as legal order.

⁷⁶ Dobuzinskis, 'The complexities of spontaneous order', *Critical Review* 3 (spring 1989), pp.249-250

⁷⁷ The uses of the word nature are considered in the next chapter. See K.Soper, *What is Nature?*, (Oxford and Cambridge, Mass., Blackwell, 1995), for an extended coverage of its different uses.

We may now understand more clearly the claim concerning Hayek's conception of justice made at the end of the last section. Hayekian justice, it was argued, was not enough to underpin a liberal legality, so Hayek's principles of law are ultimately simply an assertion of faith in the workings of the spontaneous order. This might have made Hayek's attachment to liberal principles of law appear somewhat arbitrary. But we can now see in what sense this arbitrariness is true and in what sense it isn't. Hayek does rationally endorse a liberal legality, as argued above, but since this endorsement is connected to a social and economic context, it is arbitrary *between* these contexts. In other words his choice of liberal legal principles is only appropriate given certain economic and social conditions.

This conclusion may have significant consequences for our understanding of Rawls and liberal law as a whole. Recall, that it was claimed at the beginning of this section that the Rawlsian and Hayekian selves may be more alike than normally assumed. It has been argued that in both there is a conception of the self as rational in the efficient pursuit of its ends; it is this sense of self which is the cause of liberal justice. There is also a shared conception of the self as reasonable, able to give its support to the law. This is not to ignore the differences between the two; certainly the Rawlsian conception of the reasonable as a willingness to discuss and listen to reasons for principles of justice is far richer than that of Hayek.⁷⁸ My point is merely that there is some overlap. Given this overlap of the conceptions of the self which are at the basis of their theories of justice we may now understand possible reasons for Hayek's exclusion from liberal jurisprudence.

Thomson gives three main reasons for Hayek's absence from jurisprudence:⁷⁹ (1) his legal

⁷⁸ See earlier in this chapter and chapter five for a more extended account of the idea of the reasonable in Rawls.

⁷⁹ See Thomson, 'Taking the right seriously: the case of F.A.Hayek', pp.69-70

theory is part of a wider theoretical project; (2) he doesn't fall easily into either side of the positive law/ natural law opposition through which jurisprudence categorises its theories; (3) his theory is value-laden, connected to arguments for market capitalism.

The first of these reasons need not concern us here except insofar as it overlaps with the third. The second reason we have already in part looked at with some of the implications that flow from this straddling of the two usual camps in jurisprudence. The third reason is the one that arguments in this section have been tending towards. These arguments can make this reason even sharper. Thomson's main point in this regard says of Hayek's jurisprudence 'that that which is constitutive of *his* jurisprudence, namely that it is inseparable from the argument for liberal market capitalism, is also constitutive of jurisprudence more generally. In short, only by suppressing the hidden agenda of capitalism, and treating the relation of law to capitalism as an optional and supplementary question, can jurisprudence, as the liberal truth about law, claim to be the product of universal reason and to be independent of any particular conception of the good.'⁸⁰

Now, this is a big claim, connecting jurisprudence with broader political and economic conceptions, but fortunately one that I don't think we need to officiate on. All we need to do is to keep it open as a possibility. Much argument would be needed to show that all liberal jurisprudence was in fact linked inseparably to arguments for market capitalism, arguments that Thomson does not in fact give. But Hayek raises this as a possibility and even as such constitutes a threat. His reasonable endorsement of liberal principles of justice is appropriate in certain economic and social conditions. Rawls' theory attempts to eliminate such conditions,

⁸⁰ Ibid., p.94

though it was suggested that this elimination is an embodiment of shared understandings within Rawls' political culture rather than being an attempt to reach an ahistorical and asocial viewpoint on justice. Hayek's danger is that he may make clear that Rawls' theory is more tied in with broader social and economic arguments than he would care to admit. The similarities between their two conceptions of the subject of liberal justice suggest the possibility of this danger.

We may note two implications of this comparison of the Hayekian and Rawlsian selves. (1) Hayek's discussion of law might inform us of possible subtexts in liberal jurisprudence such as Rawls'. To this extent it can give us a broader understanding of Rawls. In this regard, it has been noted how Hayek might show the Rawlsian self to be closely connected to a set of social and economic ends, rather than the detached self that is portrayed in the original position, or that this detached self is itself the product of certain social and economic conditions. (2) There is also a wider, and in this context more important, issue at stake here. Hayek's exclusion, as Thomson points out, happens in the lecture hall and academic's office, in which places Hayek receives barely a mention.⁸¹ These guardians of jurisprudence neglect, or perhaps more consciously reject, him because he talks a jurisprudence that isn't concerned with reason's pursuit of universal truths about law. In his support for custom and the common law he embodies that which modern law attempts to overcome. He is the unreasonable as opposed to the reasonable. Yet if his theory is not as far from Rawls' as is commonly assumed, it is arguable that he is created as unreasonable as a way of disguising the unreasonableness of Rawls. In this process the unreasonableness of Hayek confirms the reasonableness of Rawls.

81 *Ibid.*, p.69.

Conclusion:

It may seem as if we have come a long way from the CJPOA and our hypothetical demands. In fact progress has been made in how we might see that Rawlsian or welfare liberalism is not compatible with the hypothetical demands, and in the connected argument in how we might understand the CJPOA as liberal justice.

Recall that at the beginning of this chapter the possibility of non-instrumental relations with the land were referred to as providing a source of incompatibility between the targeted groups' demands and liberal property theory. We may now understand the exclusion of these interests as part of a broader system of exclusion at work in liberal theory. This broader system has been approached through an exploration of the subject which lies at the basis of liberal justice. Rawls, as representative of welfare liberalism, has formed the theoretical focus for discussion of this subject. His conception of the subject as rational and reasonable has been critically situated in two ways: (1) through a consideration of Locke we saw how the liberal subject may be postulated by its system of justice for a particular social purpose; (2) through Hayek this line of criticism was extended, with it being argued not only that the Rawlsian self as reasonable is opposed to the Hayekian self as unreasonable, but that this opposition is a created one designed to confirm the reasonableness of the Rawlsian self.

Importantly, then, not only have we seen the liberal subject defined in opposition to that which it excludes. We have also seen how this exclusion is in fact based on an opposition which may be created. In this creation of the unreasonable certain groups may be targeted.

As yet this targetting of groups is speculation. The next two chapters substantiate the argument. For the moment, let's note its possible implications. If we understand the subject of liberal justice as reasonable in opposition to an unreasonable which it constructs, then we may understand the groups targetted by the CJPOA as constructed as unreasonable by this very process. Therefore the targetting of these groups, which seemed apparently illiberal, is shown in fact to be liberal.

Chapter Five: The Self in Conflict

Introduction:

This chapter continues what was begun in the last. That is, it takes further a certain reading of liberal justice so that we reach some sort of conclusion on the questions posed at the end of the third chapter: can welfare liberalism accommodate the hypothetical demands of the groups targetted by the CJPOA? and if it cannot, how is the CJPOA to be understood as liberal justice? At the same time, through this engagement with these practical questions, this reading of liberal justice is sharpened. It is important to bear in mind that it is through this constant interaction between the practical and the theoretical that this work aims to reach a more sophisticated understanding of liberal justice.

In the previous chapter, Rawls provided the model of liberal justice; it was the role of Hayek to inform us on this model. He has performed this role through being excluded from the model that Rawls represents. This exclusion tells us something about Rawls and the model. This chapter moves from these oppositions within liberal theory to oppositions between the liberal and the non-liberal, oppositions which are, as we shall see, similarly constitutive of the liberal.

It is these latter oppositions which are of real interest in our consideration of liberal justice and the CJPOA, as this chapter and the next explore. However, the intra-liberal opposition gives us an initial understanding of how these oppositions might occur. The argument was, recall, that whilst Rawls and Hayek shared the same conception of the rational self as pursuing its own interests efficiently, Hayek's endorsement of liberal justice is, on the face of it, different

from Rawls. Whilst Rawls appears to argue for his principles of justice from an impartial or reasonable standpoint, Hayek connects his argument for liberal justice very closely to arguments for market capitalism. Thus while the Rawlsian self may be said to reasonably endorse the principles of justice, the Hayekian self's endorsement of them is unreasonable. An argument was given which proposed that, whilst the Hayekian endorsement was different from the Rawlsian, it shared certain important features. It was suggested in consequence that the exclusion of Hayek from liberal jurisprudence, from the model that Rawls has been given as representative, is one that is based on a created rather than a real distinction. Hayek is constructed as the unreasonable in order to confirm the reasonableness of Rawls.

This exclusion may be significant in more than one way. Firstly, as Douzinas and Washington argue, 'Jurisprudence sets itself the task of determining what is proper to law and of keeping outside law's empire the non-legal, the extraneous, law's other.'¹ What is not law is important to what is law; what is not law is part of the self-definition of law. So Hayek's exclusion could be part of the self-definition of law. This possibility will not be pursued here. Yet this creation of a certain concept of the law does model the second way in which this exclusion may be significant. For what this exclusion, I suggest, does open up is a way of understanding conflicts within liberal society, and the CJPOA in particular, since these conflicts in fact have the same structure as that between Rawls and Hayek. It is argued here that the groups targeted by the CJPOA do constitute a significant exclusion, one that may be constitutive of liberal justice itself. In this context we may therefore understand the CJPOA as liberal justice.

This chapter sets the groundwork for this particular argument, which is undertaken in the next

¹ C. Douzinas and R. Warrington, *Postmodern Jurisprudence*, p.25.

chapter. It explores the construction of the self in liberal justice as a whole. The argument here is divided into three parts: (1) the nature of conflict within liberal societies is considered, including specifically the CJPOA, and in particular how these are to be articulated within the terms of the Rawlsian self of liberal justice; (2) in more general terms it argues that liberalism constructs the unreasonable as means to confirming its own reasonableness; (3) more specifically the original position of Rawls' theory is explored in greater detail as involving this construction of the unreasonable on a theoretical level.

1. Conflict in liberal societies:

1.1 Rawls and conflict

With so many different ways of life in heterogeneous western societies it is hardly surprising that conflicts between them are likely to exist, nor that the law should wish to legislate in particular cases. As explained in the last chapter, the conflict of goods that the self is conceived as rationally pursuing is what necessitates liberal justice. But on what liberal basis can it do so? In other words what is the relationship between the individual good and the principles of justice in a liberal society? Rawls identifies this relation as fundamental: 'while justice draws the limit, and the good shows the point, justice cannot draw the limit too narrowly. How is it possible, though, within the bounds of political liberalism, to specify those worthy ways of life, or identify what is sufficient space?'² The relation is expressed as the right being prior to the good - the principles of justice cannot themselves be dependent on any conception of the good (which is precisely why such conceptions are excluded from the

² Rawls, *Political Liberalism*, p.174

original position) since then that good or end would be promoted at the expense of others, thus removing people's autonomy to choose between ends.

This of course does raise the problem of how the right is generated in the first place if not from some conception of the good. Rawls concedes that some theory of the good is needed to produce the right, but since this conception of the good is itself essential for the pursuit of any good, it doesn't discriminate between them. Rawls calls this conception the 'thin theory' of the good.³ The central idea of this theory is that people have a rational plan to their lives and that someone's good is defined by how this plan is fulfilled.⁴ Certain primary goods, it is assumed, will be essential for the rational pursuit of one's own ends. Therefore the right remains prior to the good since the theory of the good that produces the right is in fact applicable to the pursuit of any good.⁵

So the good at the basis of Rawls' theory is one of the importance of living rational autonomous lives. The purpose of the law is to enable us to live together and lead these kinds of lives, to protect our status as rational choosers between different ends or goods. Thus the liberal relegates to the private sphere the pursuit of the good; in public the right must have priority over the good. So, for example, as private people we are free to believe in one religion in particular, but as citizens we must respect the right of all people to follow the religion of

3 Rawls, A Theory of Justice, p.396

4 Rawls, A Theory of Justice, p.408. An expanded account of the good is offered in Political Liberalism, pp.176-206. For a discussion of this account see Galston, Liberal Purposes, pp.143-149.

5 There have been, of course, many objections to Rawls' moves here, in particular that theory of the good is rather thicker than he intends. For example, T.Nagel, 'Rawls on Justice', Reading Rawls, ed. N.Daniels, (Oxford, Basil Blackwell, 1975), p.9, comments that the thin theory of the good reveals a 'marked tolerance for individual inclinations'. B.Barry, The Liberal Theory of Justice, (Oxford, Clarendon Press, 1973) criticises Rawls' use of the Aristotelian Principle, which states that people enjoy the progressive realisation of their capacities in increasingly complex ways, assumed in A Theory of Justice, p.432, as a 'deep psychological fact'. Barry, pp.29-30, argues that this assumption reveals a particularly puritan view of motivation. This debate throws into doubt the claim that the right is prior to the good and the avowed neutrality of Rawlsian liberalism. However, these specific problems need not detain us here, though they do support my argument that Rawlsian liberalism produces conflict by targeting certain ways of life.

their choice. Conflicts in the private sphere will exist since it is a premiss of liberalism that goods are plural, and such conflicts are a result of rational selves pursuing their own ends. However, these conflicts need not concern us here as they do not involve a prescription of the law. It is precisely the aim of liberal law as presented here to combine private conflict with public agreement.⁶

Not that agreement in the public sphere is inevitable or even likely. Rawls admits that 'Views that would suppress altogether the basic rights and liberties affirmed in the political conception, or suppress them in part, say its liberty of conscience, may indeed exist, as there will always be such views.'⁷ Thus, 'The principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions these principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether.'⁸ These conflicts may take two forms.

One, the way of life is in direct conflict with the principles of justice. Rawls gives racial discrimination as an example here.⁹ The original position would screen out such conceptions of the good. One person's good is too often another's harm; no legality is likely to endorse the possible good of murder for the fun of it. Nor are the participants in the original position going to support such a law, for they would not know if they were to be the beneficiaries or victims of it. Essentially each person's rights to pursue their own good need to be compatible with the rights of all others to do the same.

⁶ It is important to note that Rawlsian political liberalism is not merely a matter of conflict avoidance or a modus vivendi. Rather there needs to be a real moral commitment to its principles of justice - thus the overlapping consensus of reasonable comprehensive views. See Lecture IV in Political Liberalism and Mulhall and Swift, Liberals and Communitarians, pp.183-189.

⁷ Rawls, Political Liberalism, p.65

⁸ *Ibid.*, p.195

⁹ *Ibid.*, p.196

The second way in which a way of life may be discouraged/excluded in the liberal state is, on the face of it, more controversial. Rawls suggests that certain ways of life may be admissible 'but fail to gain adherents under the political and social conditions of a just constitutional regime.' Rawls seems to have in mind goods that can only survive if they have some significant control over their cultural environment, such as particular religions.¹⁰ It is important to note that these ways of life are morally worthy but simply may not be able to flourish in a liberal society in which the structure of public life needs to lie beyond any one conception of the good. Rawls expresses some regret here: 'No society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular; and we may regret some of the inevitable effects of our culture and social structure.'¹¹

Now, this exclusion of ways of life does suggest a reversal of the priority of the right over the good. For permissible conceptions of the good are excluded not on the grounds of their contradiction of the principles of right; they are morally worthy. Galston suggests that the priority of the right is 'subtly reinterpreted as the priority of the public over the nonpublic.'¹² That is, liberal justice can only include those ways of life which can affirm the political and public conception of justice. This would seem to lead to an inherent instability in a liberal society¹³, for why should people with such ways of life endorse a society which does not provide the conditions in which that way of life can flourish? Rawls himself recognises this problem, suggesting that the best a liberal society can hope for is that 'the political conception is supported by a plurality of reasonable comprehensive doctrines that persist over time and maintain a sizeable body of adherents'. He continues, 'That is the hope; there can be no

10 Ibid., p.196

11 Ibid., p.197

12 Galston, *Liberal Purposes*, p.148

13 Ibid., p.149

guarantee."¹⁴

These are real problems for the stability of the liberal society, which will be returned to in the last section of this chapter. What they seem to indicate, however, is a theory of justice not conceived broadly enough to contain certain ways of life. I propose to argue, on the other hand, that Rawlsian theory is a theory of justice that must produce its own opposition. This argument is not completed until the end of this chapter. In the meantime, and to understand this stronger argument, we need to return to the subject of liberal justice.

What we have then are two possible scenarios of conflict between the individual good and liberal principles of justice. (1) That good may be in direct conflict with these principles, in which case it ought never get beyond the first stage of deciding those principles and into society, as it were; or (2) the good may be admissible within these principles of justice but simply can't flourish in a liberal society.

Before discussing how the groups targetted by the CJPOA might fit into this framework of conflict we need to articulate these two scenarios of conflict in terms of the conception of the self of liberal justice as presented in the previous chapter. The conception of the self in the original position has, as it was explored in the last chapter, two aspects: the parties to this contract are rational agents, that is they have 'a rational plan of life in the light of which they schedule their more important endeavours and allocate their various resources (including those of mind and body, time and energy) so as to pursue their conception of the good over a complete life.'¹⁵ They are also, recall, reasonable, insofar as they possess the moral sensibility

¹⁴ Rawls, *Political Liberalism*, p.65

¹⁵ *Ibid.*, p.177

to engage in the fair cooperation necessary to come to agreement on the selection of the principles of justice. Equally, the principles of justice are justified to you and me in reflective equilibrium as rational and reasonable agents.

This conception of the self may be translated into the two scenarios of conflict outlined above. People who reject the principles of justice which come out of the original position, the first kind of conflict, may still be rational, insofar as they are rationally pursuing their own ends as efficiently as possible. What they are is unreasonable, unable to cooperate fairly with others on terms that these others as equals might be reasonably expected to endorse. This conflict may be articulated as one between (1) the rational and the reasonable, and (2) the rational and the unreasonable.

The second scenario of conflict is more muddled when translated into these two aspects of the self. For it would appear to be the case that if the way of life excluded from liberal society is not in fact contrary to the principles of justice of that society it is excluded as reasonable.

Therefore the conflict may be expressed as one between (1) the rational and reasonable and (2) the rational and reasonable. Put as such, it points to a priority of the good over the right - since it is not the principles of justice which exclude this way of life it must be something else, or a conception of the good. We may leave Rawls' argument as confused or incomplete here or, for it is a matter that we shall return to, we may give an alternative argument for these ways of life being excluded as unreasonable.

1.2 The CJPOA as conflict:

For now, we are in a position to fit the conflict produced by the CJPOA into this schema.

Chapter three concluded that the CJPOA *may* represent a genuine conflict for liberal justice insofar as the hypothetical demands of the targetted groups may be incompatible with liberal justice. The reasons for this non-accommodation were complex, and are in the process of being worked out. As part of this process, it is presented here simply as a conflict of some sort. Doing so will help towards a more thorough articulation of the conflict.

Recall that the two hypothetical demands of the targetted groups are: (1) the use of other people's land with consent; (2) the use of other people's land without consent. Equally, it is these actions which, in certain specified ways, are proscribed by the Act. So, to take up demand (2) first: it could be argued that the targetted groups are harming others by carrying out their lives on other people's land. Their activities are simply an inability to cooperate in a society of reasonable agents who make the protection of private property part of the principles of justice.¹⁶ Thus the proscriptions of these activities is as liberal as the proscription of murder. This point of view seems to have been a prevalent one in the discussion of the Bill in the House of Commons. For example Mr. Jones MP: 'Unauthorised camping by gypsies and other travellers causes serious nuisance and offence to landowners and local communities.'¹⁷

The conflict between demand (1) and the CJPOA may be similarly characterised as one

¹⁶ As we saw in chapter three Rawls gives the 'right to hold (personal) property' as one of our basic rights and liberties. It is important to note that it is not the details of Rawls' theory that are at stake here. Rather I have accepted certain facts about our own political culture as being facts about a liberal political culture. These facts then take their place within Rawls' general methodology. It is in fact unlikely that Rawls would advocate a strong defence of property rights; the difference principle proposes expansive state intrusion into exclusive private property.

¹⁷ Hansard, 19.10.1994, p.358

between liberal principles of justice and those who cannot cooperate within these principles. There is, of course, as was explored at the end of chapter three, something rather peculiar about such a characterisation since there appears to be something very liberal about using other people's land with their consent. However, let us leave this important confusion aside for the moment, and suggest that for both demands the conflict between these demands may be put as one between (1) the rational and the reasonable and (2) the rational and the unreasonable.

The liberal might well prefer it to be characterised as the second scenario of conflict, one in which the way of life is excluded from liberal society not because it is in contradiction of its principles of justice but simply because it cannot gain enough support in a liberal society. Characterised as such, although it would be another aspect of the apparently inherent instability of liberal society, which is itself a consequence of pluralism, it might be argued that this fact doesn't show that liberalism is in principle opposed to travelling, for example, as a way of life. So travellers are not acting unreasonably in pursuing this way of life. Rather a travelling way of life is hard to sustain in a society of private property rights in land. But such an argument seems to merely bring us back to the first kind of conflict, for private property rights in some form or other must be part of the liberal principles of justice. For if they aren't then it is hard to see exactly on what moral basis private property rights in land should rule out a certain way of life. The travellers' life can only be condemned if private property is part of the principles of justice. The conflict of the CJPOA is not then one between (1) the rational and reasonable and (2) the rational and reasonable.

Put in these stark schematic terms, the conflict is then of the first type, showing a principled

incompatibility between liberalism and the targetted groups' demands. It is a conflict between (1) the rational and reasonable and (2) the rational and unreasonable. Now, this is hardly a startling conclusion, nor one that would worry the liberal unduly. For murder or child abuse would be equally proscribed by liberal principles of justice, and murderers and child abusers designated unreasonable, at least. Such a designation seems a matter of little controversy. I do not wish to get into the thorny question of distinctions and similarities between travelling and killing. It hardly needs saying that there is a firmer moral base for the proscription of murder than there is for the proscription of using someone else's land. These differences though are hardly the point. For the liberal there is something illiberal about both actions. The CJPOA is therefore, on this account, a liberal law.

1.3 Back to Hayek:

The above is obviously not an argument for the CJPOA as liberal justice. Rather it is a statement of its structure in terms of the liberal self if it were. In fact, as we have seen, there are problems with its being categorised as part of liberal justice; its liberalness is not entirely straightforward (as the cases of murder and child abuse may be), and consists of theoretical strategies that liberals may not be happy to accept.

Hayek can again provide a useful perspective on Rawls which allows us to begin to unravel these strategies. For Hayek the avoidance of conflict is a central concern; justice, as was discussed, is for him the problem of coordination. So again it is to the nature of Hayek's rules that we must look to find his views on avoiding conflict. Agreement on particular ends is not likely amongst individuals; what is likely is agreement on means to serve these ends: 'There

would not exist harmony but open conflict of interests if agreement were necessary as to which particular interests should be given preference over others. What makes agreement and peace in such a society possible is that the individuals are not required to agree on ends but only on means which are capable of serving a great variety of purposes and which each hopes will assist him in the pursuit of his own purposes.¹⁸ It is because rules are general/abstract and equal, they don't refer to ends which inevitably will differ but only to means which all may share, that conflict can be avoided in a liberal society.

Obviously such an answer is the one we would have expected from Hayek. It shows a concern for how individual interests may be coordinated in heterogeneous societies without imposing one conception of the good. Furthermore, he does not go to some social contract to argue how this agreement may be hypothetically achieved, but sees it lying in the nature of the rules that will evolve out of the spontaneous order. However, as a solution to the problem of conflict Hayek's rules just won't do. For it seems far from the realms of the inconceivable that Hayek's rules as multi-purpose means will not serve all possible ends and may interfere with the pursuit of some ends. Whilst they may rule out goods such as murder which interfere with the very possibility of having ends, Hayek's emphasis on property rights, for example, would not seem to serve all possible interests, someone whose way of life depends upon certain spaces of common land perhaps.

To go back to the rational and reasonable selves, Hayek's theory certainly contains the first of these selves, as suggested earlier. The rational self lies at the basis of conflict with its pursuit of different ends. It is the reasonable self that is the more interesting. For conflict is only going

¹⁸ Hayek, *The Mirage of Social Justice*, p.3

to be avoidable if we hold this adherence to liberal principles alongside our rational pursuit of our own ends. And Hayek shows that such an attachment is only reasonable if we accept certain liberal values in the first place, in particular the importance of the free-market. What Hayek makes clear is that conflict is only soluble if everyone reasonably endorses a liberal legality, which endorsement is not, however, a matter of universal reason, but springs from an already liberal context.

It is in this way that Hayek can inform us as to the liberalism of Rawls. But if this informing was all there is it would not be of great interest, for we might have been able to provide this critique without resorting to a discussion of Hayek. What is more interesting, and which brings us to how Hayek can help us unravel the liberal nature of the CJPOA, is that he is a liberal who has been excluded, or hidden, from liberal jurisprudence. And he is hidden, or so it might be suggested, because he reveals what the assertion of the reasonable self hides. Thus he is excluded as the unreasonable. The opposition between him and Rawls may be expressed as one between the reasonable and the unreasonable. It has the same structure as the conflict between the targetted groups' demands and the proscriptions of the CJPOA. We saw in the last chapter how the unreasonableness of Hayek may be created as a way of confirming the reasonableness of Rawls. There may be a similar process taking place in the CJPOA. The targetted groups may be created as unreasonable, as a way of defining the reasonableness of the liberal, law-abiding subject. If this process of construction and mutual self-definition is in fact real then we may be able to understand the targetting of certain social groups in the CJPOA as typically liberal. We return to this targetting in the next chapter. For the rest of this one we need to consider the construction of the unreasonable.

2. The unreasonable excluded:

Hayek, it has been argued, is excluded from liberal jurisprudence, from the reasonable. Those ways of life targetted by the CJPOA are excluded from a liberal society, again from the reasonable. They are both excluded as the unreasonable. These exclusions are now put in a broader context of exclusion practised by liberal theory. What is explored in particular is the possibility that those excluded from a liberal society are excluded as *natural*, the unreasonable associated with the natural just as the reasonable is associated with the civilised.

This exploration introduces some new concepts into our discussion of liberal justice. Firstly, there is the idea of liberal justice as part of the project of modernity, a project a central part of the aim of which is to know and order the world through individual reason.¹⁹ Through a brief critique of modernity we come to a certain understanding of liberal justice which supports the conclusions of the last section.

Secondly, there is the idea of the natural. There are perhaps few words more dangerous than 'nature' to conduct an argument through. Kate Soper considers many of the different ways in which we use the concept and how it can be used to justify a variety of ideological positions.²⁰ Nevertheless, and bearing these dangers in mind, the idea of the natural is central to the argument in this section. It is important to note, however, that in line with its complex usage the natural is associated in the argument that follows with both the reasonable and the

¹⁹ It is not my intention to get caught up in debates over the nature of modernity. Modernity of course involves more than simply this knowing and ordering the world through reason. For an introduction see Z.Bauman, *Intimations of Postmodernity*, (London/New York, Routledge, 1992), Introduction.

²⁰ See K.Soper, *What is nature?*, p.3. Her concern is with what she calls the 'politics' of the idea of nature. She mediates between ecology's appeals to an extra-discursive nature that we are destroying and postmodernism's arguments that make nature a cultural product that is used to 'legitimate social and sexual hierarchies and cultural norms,' p.3.

unreasonable.

Nature as un-valued is assumed in this argument. It is as un-valued that it can be associated with the unreasonable. Certainly this un-valuing is a process that has received much attention in recent critical theory, postmodern theory and environmental philosophy. It is an idea that we have already come across; remember at the end of chapter three it was suggested that part of liberalism's inability to accommodate the hypothetical demands of the targeted groups was because it cannot include non-instrumental relationships with the land, or nature. In other words it cannot accommodate a relation with the natural that does not un-value it. In this process, it was suggested, it excluded certain interests which may hold different relationships with the land. It may be possible to draw a link between this un-valuing of nature and the categorisation of certain interests as natural. I do not pursue such an argument. Rather I assume an un-valued nature which serves to explain the importance of characterising certain people as natural. The question of the instrumental is looked at in the concluding chapter.

Essentially instrumental rationality structures a relationship with nature that is separated and which devalues the non-human, or perhaps more accurately the non-subject, since clearly people can be objects as well. Nevertheless, this separation from nature is not always celebrated. In cultural discourse nature is represented not only as a resource for human use but as Mother, the site of nurturing, of being with and not excluding as other.²¹ Some environmental philosophies contain this epistemological and ontological shift as do certain religions. Our relationship to nature is not merely an instrumental one.

²¹ *Ibid.*, p.71

However, that there is a distinction of some sort between people and nature (or the rest of nature) seems obvious. As Soper argues even those who deny it are still tacitly relying on the distinction.²² The possible nature of this distinction is again addressed in the final chapter. For now I assume a distinction of some kind and look at the positing of some people in the category of the natural, and what this naturalisation means for these people.

So to a possible argument for the creation of the unreasonable. Soper comments on the word humanity: 'What is deployed, as if it were a universal concept, carries within it the traces of a semantic history that has always defined what is more properly or truly 'human' on the model of western culture, and has selected in favour of that in its very disposition to think of other societies as 'primitive', 'closer to nature' or less alienated from it.'²³ There are three claims being made here: (1) The western concept of humanity is used as *the* universal concept of humanity; (2) this universality is based on an opposition, to that which it is not, which consequently defines what the proper concept of humanity is; (3) this opposition is between the civilised or the cultured and the natural or the savage.

Soper considers this opposition and consequent self-definition broadly, one as existing between societies. I aim to suggest that a similar process can take place within societies, particularly liberal societies. Peter Fitzpatrick's discussion of imperialism, although again concentrating on the opposition between societies, provides a useful framework for considering how this process might take place, since his argument considers the rational and reasonable self of liberal law and its natural other, the savage.

²² Ibid., p.39, 'Arguments that would assimilate nature to culture by inviting us to think of the former always as the effect of human discourse presuppose the humanity-nature distinction as the condition of their articulation.'

²³ Ibid., p.61

Fitzpatrick's argument involves more than a *simple* opposition between the reasonable/civilised and the unreasonable/natural: 'When the universal project of Enlightenment confronts the limits of its appropriation of the world, it creates the very monsters against which it so assiduously sets itself.'²⁴ This creation of opposition, monsters, to set oneself against may happen in various ways. Its relation to property rights is explored in the concluding chapter. It also happened, Fitzpatrick suggests, in liberal law's role in the imperial project. Liberal law, as part of the universal project of Enlightenment, is similarly blocked in its attempts to provide a universal law for the world. It is blocked, Fitzpatrick argues, because of 'other sites of power', in the case of imperialism the power of law as custom rather than as the expression of rational and reasonable will. Liberal law operated in two complementary ways towards these conflicting sites of power. (1) It 'operated negatively to constitute these entities by standing in constant opposition to them, thereby asserting their essential alterity.'²⁵ Therefore these other sites of power are constituted as natural by their opposition to the civilised, by their very otherness. (2) 'It operated positively to constitute them by expressly constructing and 'recognising' them.'²⁶ As well as standing in opposition to them it positively constructs them as natural. Thus it is not because the Africans were uncivilised that we acted imperialistically towards them; rather it was our acting imperialistically that 'created' them as uncivilised.²⁷

This analysis may be translated into the case in hand. It might be concluded that the groups targeted by the CJPOA constitute equally a conflicting site of power which tests the universal competence of liberal law. Certainly there is evidence of their naturalisation or perhaps more appropriately sub-humanisation. Paul Marland has remarked infamously of travellers, 'They

24 P.Fitzpatrick, 'The desperate vacuum': imperialism and law in the experience of Enlightenment', *Post-Modern Law*, ed. A. Carty, (Edinburgh, Edinburgh University Press, 1990), p.105.

25 *Ibid.*, p.104

26 *Ibid.*, p.104

27 *Ibid.*, p.96

call themselves New Age Travellers: in Gloucester we call them new age vermin.' As The New Statesman and Society argues, 'Vermin and scum and wasters and squatters and riff raff become subhuman species and then are treated as such.'²⁸ (In a revealing historical parallel Dr. Ritter, head of Nazi research into gypsies, said in 1940: 'results of our investigations have allowed us to characterise the gypsies as being a people of primitive ethnological origins, whose mental backwardness makes them incapable of real social adaptation.')²⁹ George McKay suggests that the names given to New Age travellers reveal a culture of attitude towards them. Regarded as crusties, soap dodgers, drongos, mutants, hedge monkeys it is hardly surprising that their way of life needs confronting and legislating against.³⁰

Nevertheless, the point should not be overstated. Empirical support of majority attitudes towards those targetted by the CJPOA is at best tangential to my approach here.³¹ The attitudes of MPs whilst debating the legislation will be considered in the next chapter, giving some more substance to my basic claim here. Nor should the extent to which travellers and other groups assume those identities which are given to them be ignored: in McKay's terms they deliberately assume 'risk identities'.³² These risk identities are not only a matter of setting themselves up as against the government, but as also taking on a way of life which contrasts absolutely with majority culture. McKay discusses the importance of dress and dirt as part of their self-definition.³³

28 T.Malyon, 'Criminal injustice', New Statesman and Society (Criminal Justice and Public Order Bill Supplement), 1994, p.vi.

29 Fraser, The Gypsies, p.260. Drawing parallels between Nazi Germany and Britain of the 1990s is of course dangerous as it risks a devaluation of the horror that was the Nazi final solution. Nevertheless these dangers shouldn't blind us to the possibility that a similar process, if of a very different degree, is taking place at both times.

30 See G.McKay, Senseless Acts of Beauty, (London/New York, Verso, 1996), p.49, for a fuller list of names.

31 Nor is it entirely clear what these majority attitudes might be. For example, as S.Fairlie points out in 'Tunnel vision: the lessons from Twyford Down', The Ecologist, 23 (January/February 1993), p.2, road protesters such as the Dongas and Earth First! have captured the imagination and support of a wide range of people from both ends of the social spectrum. This is a process which has continued with the broader popular support for the protesters through Newbury, Fairmile and Manchester airport. Many of them, most famously Swampy, have become media figures; one is tempted to suggest that this media coverage is an attempt to appropriate and mitigate the revolutionary potential of their actions.

32 McKay, Senseless Acts of Beauty, p.50

33 *Ibid.*, p.66

Fortunately, whilst it is worth bearing in mind such complexities, it is not my task here to adjudicate on such problems. This is not a study of the counter-culture in Britain today but rather an exploration of liberal justice and its opposites. What has been posited is a way of understanding this conflict between the reasonable and unreasonable self. What *is* clearer now is the character of the excluded self and how it fits in with a whole process of cultural self-definition. Those targeted by the CJPOA are the natural savages, the primitives that the imperialised were in the nineteenth century. Depicted as such they oppose and confirm the reasonableness of those who are not.

Again though there is an ambivalence in this naturalisation. For not only is the savage something to define the civilised against; it may also provide a point of criticism of the civilised, being in fact more noble in its lesser alienation from nature. Soper talks of 'a schizoid projection of the barbarian 'other' as both brutal and noble, wild and gentle, ferociously impervious to the civilising influence of art and science, or righteously repelling its pernicious effects.'³⁴ One might similarly note an ambiguity of attitude towards travellers, squatters and protesters. Whilst being portrayed as dirty and drunk there is a sense as well that their simpler way of life may provide a critique of our own.

This ambiguity in the status of the natural is not without significance. In particular the embracing of the natural can be a way of obscuring a deeper process of exploitation that is taking place. Such complications will be explored in the final two chapters. They merely confirm, however, the main line of argument taking place here - the natural and unreasonable

³⁴ Soper, *What is Nature?*, p.78. Soper also notes, p.32, how, in other contexts, the natural is used to condemn 'deviants'. Thus homosexuality is often condemned as unnatural. This appropriation of the natural for condemnation has led some gay activists to recognise the role that the natural plays in constituting sexual identities rather than argue for homosexuality as being itself natural.

are produced as ways of defining the civilised and reasonable. We may see how this production parallels Hayek's exclusion from liberal jurisprudence as the unreasonable. This position also allows us to get a critical grip on the scenarios of conflict presented in the first section of this chapter. The unreasonable as those opposed to liberal principles of justice may be produced by the liberal notion of the reasonable. Thus the groups targetted by the CJPOA may be produced as the unreasonable. It is useful now to return to Rawls, for a plausible case can be made for this production of the unreasonable taking place at the heart of his theory.

3. The criminal in Rawls' original position:

This consideration of the production of the unreasonable introduces the idea of the criminal. Criminality is explored in greater detail in the next chapter when the CJPOA is reconsidered in the light of certain arguments that have been explored since chapter three. For now it is enough to say that the criminal is the enemy of the state. A criminal wrong is at least distinguished from a civil wrong in that it is an action that offends the public or the state rather than simply another individual. The criminal therefore stands outside the principles of justice of that state. His action is of the type proscribed by these principles, whatever they may be. The criminal is the unreasonable.

The existence of criminality is, on the face of it, problematic for the state. By pointing to activities or ways of life which are outside the principles of justice of that state it indicates a condition of conflict within that state, a lack of support for the rules which constitute that state. It is this question of support for a public conception of justice that Rawls, as discussed in the opening chapter, explicitly addresses in his later work. For Rawls the modern state, or at

least liberal democracy, is characterised by a plurality of comprehensive and incompatible religious, philosophical and moral doctrines. The challenge for political philosophy is to explore the possibility of shared understandings in the political conception even if these are not possible on a comprehensive level. He claims that his principles of justice, as articulated in A Theory of Justice, would receive an overlapping consensus of support from reasonable comprehensive doctrines. Political liberalism has its roots in how seriously it takes the possibility of conflict in pluralistic societies.

We are now in the position to complete the argument that Rawls' hopes in this regard are overstated. Certainly at points in Political Liberalism they seem to be rather despairing hopes: for example he claims that views contrary to his principles of justice 'may not be strong enough to undermine the substantive justice of the regime. That is the hope; there can be no guarantee.'³⁵ It is concluded that Rawlsian liberalism taking conflict seriously in fact involves a commitment to that conflict. In particular I argue that Rawls is committed to the production of criminality, to the production of people whose actions or ways of life are in direct conflict with the principles of justice that he proposes. I doubt that this commits me to arguing that it is productive of all criminality. Certainly it does commit me to arguing that it is productive of some criminality. And certainly it might lead to the conclusion that criminality far from being problematic for the state is in fact an essential part of the maintenance of that state. The argument allows us to see in Rawls a similar process of the production of the unreasonable as outlined in the last section. We also see how the criminal as the unreasonable may be created - the targetting of certain groups in the CJPOA can therefore be understood as a product of liberal justice.

³⁵ Rawls Political Liberalism, p.65

This argument is conducted largely through a consideration of the nature of the parties to the original position. Yet though the contract struck between these parties is an important part of Rawls' argument for his two principles of justice, it is far from being a justification on its own, as was explored in the previous chapter. The links with the broader process of reflective equilibrium are essential. Briefly, towards the end, my conclusions will be considered in the context of this broader process.

The original position is hardly, as Rawls tells us, a general assembly of all people past and present.³⁶ Rather it is a representational device which models some of our basic convictions about justice. As such the parties to it are conceived of in a certain way. Essentially they are to be thought of not as individuals with specific goals and desires, but rather as citizens who embody some basic convictions about justice.³⁷ It is of course a peculiarity already noted, and one the significance of which will be explored at greater length later, of Rawls' contract that it is not really a contract at all. The parties to it are characterised in such a way that, with the assumption of a certain model of rational choice, they have to come to the agreement that they do. There is no room for critical discussion between them. Essentially then the parties to the contract already embody the principles of justice that they are to select. To be outside of these parties is to be outside of justice and, despite Rawls' claim that this contract is between all citizens, the parties as citizens are exclusive, in the sense of excluding other conceptions of the person, in at least two ways.

As citizens, Rawls says, they can be 'a normal and fully cooperating member of society over a

36 Rawls, *A Theory of Justice*, p.139

37 Rawls, *Political Liberalism*, pp.258-259

complete life.¹³⁸ The reference to normal should put us on our guard. Only those with capacities within the normal range are admitted to the original position. Those who fall outside this range are excluded: 'since the fundamental problem of justice concerns the relations among those who are full and active participants in society, and directly or indirectly associated over the course of a whole life, it is reasonable to assume that everyone has physical needs and psychological capacities within some normal range.' The exclusion of people outside this range in theory leads to an exclusion of their interests in practice, as Rawls goes on to acknowledge: 'Thus the problem of special health care and how to treat the mentally defective are set aside. If we can work out a viable theory for the normal range, we can attempt to handle these other cases later.'¹³⁹

This, I suggest, is the first type of exclusion from the original position. Exploration of it is important to our argument and it will be returned to later. There is a second type, however, which is more relevant to the issue of criminality. The parties to the original position are characterised, as we have seen already, as both rational and reasonable. Anyone pursuing their self-interest (broadly conceived) may be regarded as a rational agent. On its own the rational is not going to be enough to generate or select principles of justice. Thus the agent as reasonable expresses at least the desire to engage in moral cooperation.

It is through the idea of the reasonable that the second exclusion from the original position takes place, the one relevant to criminality. As was made clear in the first section of this chapter the rational cannot be a way of discriminating between the just and the unjust. One can be unjust and still be rational, as Rawls notes by the possible psychopathy of solely

38 *Ibid.*, p.18

39 *Ibid.*, footnote at p.272

rational agents. Therefore if parties to the contract are to make this discrimination it must be through the notion of the reasonable, the unjust being the unreasonable rather than the irrational. So it is the unreasonable which is excluded from the original position.

The point is important so let's be clear as to exactly what Rawls means by the reasonable. Recall, that he specifies two aspects to it: (1) it is 'the willingness to propose fair terms of cooperation and to abide by them provided others do,' and (2) the acceptance of the burdens of judgement, or the causes of disagreement between reasonable individuals.⁴⁰ Conversely, to be unreasonable is to lack this moral sensibility and not be willing to accept these burdens of judgement, or as a citizen to assert one's own comprehensive view as true and as such the only one appropriate for the political conception.

It has been argued in the first section of this chapter that there are two ways in which the unreasonable might be excluded from the Rawlsian state. The first is when the way of life is in direct conflict with the principles of justice. Such ways of life could not be approved by the parties to the original position. As reasonable people they could not accept as reasons for ways of life that which denies the capacity of some other person as a free and equal source of reason. The second way of exclusion/ discouragement is, it was noted, more confused. Here the way of life may be admissible but fail to gain sufficient adherents under a liberal regime. In section one of this chapter it was left open as to what Rawls means by admissible here.

Certainly it seems to refer to a way of life that is reasonable since it is not in conflict with the principles of justice. Yet he does characterise such goods as only able to survive 'if it controls the machinery of state and is able to practise effective intolerance.'⁴¹ And such an assertion

⁴⁰ Ibid., p.54

⁴¹ Ibid., pp.196-7

does seem to be in line with the suggestion that 'It is unreasonable for us to use political power, should we possess it, or share it with others, to repress comprehensive views that are not unreasonable.'⁴² So we might say that these goods are rejected in the original position, or to put it another way the reasonableness of the parties to this position precludes such goods and excludes therefore those who might hold them.

On the other hand these goods might be seen as reasonable. This possibility allows for goods to be excluded from a liberal society but still be reasonable. What this possibility implies therefore is that the notion of reasonableness, as it appears in the original position, is not as central to exclusion as I am trying to argue that it is. This conclusion need not affect the substance of the argument. There may be other ways of excluding ways of life from liberal society other than through the idea of the reasonable. The reasonable, though, is still an excluding concept. Nevertheless, an argument may be made for these ways of life being excluded as unreasonable.

Galston can help us here. He argues: 'If I know that the principles adopted in the original position may impair my ability to exercise, or even require me altogether to surrender, the values that give my life its core meaning and purpose, then how could I agree in advance to accept those principles as binding?'⁴³ Wouldn't I rather retreat into a homogenous community which would respect that which is central to my life?

For central to Rawls' arguments, emphasised in his later work, is an acceptance of the fact of a pluralism of comprehensive religious, moral and philosophical doctrines. That justice should

⁴² Ibid., p.61

⁴³ Galston, *Liberal Purposes*, p.147

be independent of these is to apply 'the principle of toleration to philosophy itself.'⁴⁴ In other words what is important is not the possible truth of any of these doctrines (Rawls is not a sceptic as such), but the fact that people hold different ones. Accepting this plurality, Galston argues, comes at a cost for some people 'for it is a pluralism that excludes them', if they hold a comprehensive view that cannot flourish under the tolerant colours of a liberal society.⁴⁵

Furthermore, the notion of reasonableness used by Rawls seems to be very closely linked to this acceptance of plurality. For it is only by accepting a heterogeneous society that the demands of reasonableness need to be built into the original position. Those who are excluded from the original position by the fact of plurality are also therefore excluded by the conception of the parties to this contract as embodying reasonableness as a reaction to this plurality.

Two forms of exclusion from the original position have been isolated. (1) The explicit exclusion of groups outside the normal range of physical and mental abilities; (2) the exclusion of those groups who hold unreasonable comprehensive views. Now, it may, on the face of it, appear clearer who is excluded by (1) than by (2). However, the exclusion of those outside the normal range of physical and mental abilities, or the disabled, can help us to understand the exclusion of the unreasonable, for it is based on a commitment to some conception of the normal, a conception which people with disabilities and mental health problems are deemed not to fall under. Exclusion on this theoretical level means that their interests and needs suffer in a practical context. We see this lack of consideration in the world around us. Yet it is not clear that this conception of the normal is a given. In fact arguments today stress how disability is at least in large part a function of the relationship between the person and their social environment, and to this extent existing in a state of mutual construction with the

44 Rawls, *Political Liberalism*, p.10

45 Galston, *Liberal Purposes*, p.147

normal.

A similar process might take place with the notion of the reasonable; it is in fact controversially produced out of its relationship with the unreasonable. Before exploring this possibility it is important to recap on exactly where our argument has got to, since this exploration of the production of the unreasonable, or the criminal, takes us towards the heart of our critique of liberalism.

In chapter four it was argued that Hayek was constructed as unreasonable in order to confirm the reasonableness of Rawls. Earlier in this chapter it was suggested how, in the case of imperialism specifically, liberal justice produced the savage as means of substantiating its own subject.

Now, the consideration of Hayek allowed us to see how our understanding of liberalism might be structured. The discussion of liberalism's production of the savage allowed us to see how this understanding might work in practice; that liberalism is structurally committed to the creation of enemies, of those outside the liberal legality. Of course, conclusions reached concerning this exploration of liberalism and imperialism cannot offer any definite conclusions on Rawlsian liberalism. It might be argued that imperialism's production of the savage was a mistake of liberalism, some historical accident.

However, whilst it would be wrong to jump from conclusions about a particular historical phase of liberalism to conclusions about Rawlsian liberalism, these historical conclusions do give us reason to explore the possibility of a similar process happening in Rawlsian theory.

The relation between theory and supposed instantiations of this theory in practice will become clearer as the argument proceeds in the rest of this chapter and the next.

This reason, referred to above, is confirmed by the exclusion from the original position of those with disabilities. It was suggested above that this exclusion was based on a controversial conception of the normal which, in part at least, creates the category of the disabled. So we see in the original position what I have argued elsewhere as regards liberal theory - the controversial creation of the excluded. What hasn't been shown in this particular case of the disabled is that this creation is necessary to Rawls' conception of the normal. It is this step that I undertake to argue in my consideration of the exclusion of the unreasonable from the original position. That is, that not only is the notion of the unreasonable controversial, but it is necessary for Rawls' conception of the reasonable. As part of this argument I return later to discussion of the disabled as the unreasonable.

Thus the aims of the remainder of this chapter are initially twofold: (1) to explore the construction of the unreasonable in the original position, and (2) to argue that this construction is necessary to the notion of the reasonable. Out of discussion of these two problems will come an understanding of the Rawlsian production of the unreasonable. In particular, we will see that the notion of the unreasonable cannot only involve uncontroversially unreasonable ways of life, but must also involve the construction of some ways of life as controversially unreasonable.

Where, however, might conclusions here leave us as far as the CJPOA is concerned? It would be too early to say that the CJPOA fits into this model of conflict production. For what will

have been developed is a certain position on Rawlsian theory - that its conception of the reasonable commits it to the production of the unreasonable or the criminal. As a theoretical point this process may be seen as entirely conceptual. It can't tell us on its own why and how criminals may be created in practice. How this creation may take place is considered in the next chapter with its focus on the CJPOA. There we will move from theoretical claims about liberalism's production of the unreasonable or the criminal to arguments as to how liberalism fills these categories with actual groups of people.

To return anyway to (1) above, the construction of the unreasonable in the original position, or its construction as a means of excluding it from this contract. Margaret Moore, in a recent article finds two problems with this postulated concept of reasonableness. She wonders firstly whether it is a plausible assumption to make, that people have a fundamental moral motive.⁴⁶ I'm not sure that this is a particularly fruitful line of argument. Whether it is plausible or not would seem to be an empirical question, the answer to which would be hard to discover. But that it is an assumption is important in the light of the central role it plays in Rawls' argument. For secondly Moore argues that in the idea of the parties as reasonable is built the very conclusions that the contract between them is supposed to generate.⁴⁷ In the original position the veil of ignorance models the conviction that one's social position or particular comprehensive doctrine is not reason to favour this position or impose this view on others. It is in this way that the original position models the reasonableness of its parties. It is suggested of course that the principles they come up with to govern their society will be those that can be endorsed by an overlapping consensus of reasonable doctrines.⁴⁸ This is a point that we

46 M. Moore, 'On reasonableness', *Journal of Applied Philosophy*, 13 (1996), pp.169-70, argues that it is an assumption of philosophical psychology.

47 *Ibid.*, p.172

48 Rawls, *Political Liberalism*, p.134

have already noted; the original position cannot provide a justification of the principles of justice on its own but is rather part of the wider justificatory process of reflective equilibrium.

So Rawls would argue that such an argument is rather missing the point, or perhaps that it is no argument at all. For the original position is a device of representation, and a part of a larger argument, into which we put what we want. For him 'the nature of the parties is up to us.'⁴⁹ Furthermore this nature is implicit in our political culture. Therefore what you get out depends on what you put in. However, and conversely, what you don't put in you do not get out. Since what you don't put in depends on what you do, and since the characterisation of parties as reasonable is strong enough to do away with the need for them to come to an agreement at all, there is cause for concern here.

For the point is that the notion of the reasonable is central to Rawls' method of justification. And it is suggested that the Rawlsian conception of the reasonable may be constructed in opposition to a conception of the unreasonable. If it is, then the unreasonable is essential for the reasonable and conflict is inherent even at the level of the theoretical justification of the liberal principles of justice. And we must be concerned about a form of argument dependent on a concept which is produced out of opposition to that which it excludes.

We see the place of the reasonable in Rawls' argument and how the process of the construction of the unreasonable may take place. How we view this process may be sharpened by considering our second question: is this construction of the unreasonable necessary to the reasonable? For there may be a way out here for Rawls if his account of the reasonable allows

49 Ibid., p.28

for the possibility that whilst some people may be unreasonable, there does not need to be a category of the unreasonable. In other words, can it allow for the possibility that not only are all the parties to the original position reasonable, which they are, but that there are no others, beyond it as it were, who are not reasonable? If this were possible it would show that the reasonable is not produced out of an opposition with the reasonable.

As we have seen reasonableness is conceived of as a powerful moral virtue, that which allows us to justify ourselves to other people through reason, whilst accepting the justification of others through reason. In this sense it works its way towards the impartial standpoint that liberal legalities attempt to embody, that in which all reasonable goods co-exist peacefully because the laws are based on no good in particular. Thus the right is prior to the good. But it is not at all clear that the reasonable may not be conceived of in other ways. Moore gives as an example laws in Quebec which seek to protect the Quebecois' cultural identity. Reasons might be given justifying these laws, but these are reasons from a partial rather than an impartial point of view.⁵⁰ It would not be hard to think of other ways in which one might be partial but reasonable all the same.

It might of course be objected that it is precisely this notion of reasonableness that justice as fairness rejects. However, to make this move would be in effect to concede the point that I am trying to make, for it would show that the reasonable is controversially produced out of the unreasonable. There is no simple meaning of the reasonable. By being so produced it creates the unreasonable in opposition to itself which then serves as a way of defining the reasonable. Therefore from the beginning the unreasonable is essential to the parties as reasonable in the

⁵⁰ Moore, 'On reasonableness', p.171

original position. They may be excluded from the original position but their exclusion is central to the self-definition of the parties to this contract and therefore to the principles of justice that the characterisation of these parties is designed to lead to.

More specifically, we can see how this process works if we return to the disabled. Earlier, it was suggested, in very general terms, that their exclusion from the original position was based on a controversial conception of the normal which constructs a conception of disability.

Looking in more detail at the original position we can see how the exclusion of the disabled is crucial to the reasonableness of the Rawlsian project. For if the demands of the disabled were included, the results, in terms of social justice, would not be acceptable to reasonable people in reflective equilibrium or to an overlapping consensus of reasonable doctrines in a liberal society. What might be owed to the disabled if their claims were included might be so great that the reasonable person would not agree to it.

Therefore the disabled are excluded from the original position. It should be clear that this cannot be a 'simple' exclusion, if the claims of the disabled are seen as unreasonable, for they are only unreasonable in order to confirm some controversial notion of the reasonable. And this is why the construction of the unreasonable is necessary to the Rawlsian project; it has to be necessary if the notion of the reasonable is to have any force at all. If Rawls is to talk of the reasonable, and if this notion of the reasonable is going to play a central part in the process of justification, then the claim that certain claims are reasonable is going to be arbitrary unless the unreasonable is given as a point of comparison. To know why something is reasonable we are going to need to know what is unreasonable. And this process does not just apply to the exclusion of the claims of the disabled, but to all groups who are excluded by the notion of the

reasonable. Some of these may seem uncontroversially unreasonable; for others it may be harder to see why their ways of life are unreasonable. I come back to this distinction and its significance in a moment.

So, we have seen how (1) the unreasonable may be constructed so as to exclude it and (2) that this process is necessary for the Rawlsian conception of the reasonable. Thus we come back or arrive eventually at the criminal in the original position. The criminal as the unreasonable is part of the original position, not strictly as a party to this contract, as these parties are defined in a certain way, but as part of the process of this definition. This conclusion undercuts the Rawlsian commitment to the importance of stability, for he in fact seems committed to conflict through the creation of criminality. Again, as said earlier, I am not claiming that all criminality is produced or constructed, at least in this way, but only that some of it is which is enough for the argument here. The CJPOA can be interpreted in just this way. Rawls claims that one of the great virtues of his state is that in it nothing need be hidden. This is not to say that nothing is hidden but, 'in a free society that all correctly recognise as just there is no need for the illusions and delusions of ideology for society to work properly and for citizens to accept it willingly.'⁵¹ And yet it seems that there is something hidden at the heart of Rawls, the criminal or those opposed to a Rawlsian theory of justice.

It was suggested earlier that this conclusion was still some way from telling us much about the CJPOA as liberal justice. How the CJPOA fits into this model will be explored in detail in the next chapter. What we know now is that the production of the unreasonable is part of the substantiation of the reasonable.

⁵¹ Rawls, Political Liberalism, footnote at p.68

Not that this conclusion should persuade us that the reasonable/unreasonable distinction is not a useful one. That it is useful tells us something important about the construction of the unreasonable in the original position. There are ways of life which seem uncontroversially unreasonable (such as violence or racism) and it is these ways of life that Rawls seems to be appealing to in his conception of the unreasonable. What is being suggested here is that this process cannot stop where Rawls may want it to, with the exclusion of these paradigmatic instances of the unreasonable. Rather the deeper structure of the construction of the unreasonable, as explored above, may mean that more controversial placings of the unreasonable take place, placings that may include the groups targetted by the CJPOA. Discussion of the exclusion of the claims of the disabled as unreasonable shows how this might happen. On the face of it anyway, these claims are not unreasonable in the way that the claims of a murderer might be. And we have seen that Rawls' notion of the reasonable demands the exclusion of certain claims as unreasonable on this basis. This is a controversial placing of the unreasonable and it is this opening, as regards the CJPOA, that the next chapter explores.

Arguments concerning this controversial construction of the unreasonable are confirmed in the context of the larger argument for his principles of justice that Rawls gives. The original position of course can hardly offer a justification of these principles on its own. A hypothetical agreement between highly idealised parties cannot be sufficient reason for you and me, and it is to us that Rawls wants to justify his theory, to accept these principles. Rather it forms part of the process of reflective equilibrium, part of the balancing of our considered judgements about justice with principles that can account for and support these judgements. The

conception of justice that best reaches this balance is, Rawls claims, the one most reasonable for us to accept. The principles of justice are to be justified to us as reasonable people.

That there is a dangerous circularity in this argument is clear. Just as the conditions defining the reasonable in the original position already embody the perspective of justice that the contract reaches, so the characterisation of us as the objects of justification as reasonable already presupposes the principles of justice that are to be justified to us. However, and to whatever extent this circularity affects the strength of Rawls' justification of his principles, there is something equally interesting and possibly more damaging going on here. It was suggested earlier that the circularity of the original position taken on its own as a justification of the liberal principles of justice is an indication of the controversial background out of which and against which Rawls produces his notion of the reasonable. This conclusion, of the production of the reasonable through the unreasonable, might be reached without involving discussion of the circularity of the argument. Nevertheless, what this circularity does suggest is that Rawls intends to produce principles of justice which do exclude, as we have seen and as he would admit, through a conception of the person which, characterised in the same way as these principles of justice, is similarly exclusive. Thus it is a controversial notion of the person as reasonable. Nor can we turn to reflective equilibrium for a stronger argument for this method of justification is equally circular. So in the larger argument the larger circularity indicates a similar background of controversy. The criminal is part of this background against which the reasonable is asserted. You and I are reasonable only if the criminal as the unreasonable is there as well.

Conclusion:

Our understanding of liberal justice has clearly moved on from the last chapter. There we were left with the conclusion that the reasonable Rawlsian self of liberal justice may construct the Hayekian self as unreasonable. This conclusion may have left us with an insight into how liberal jurisprudence wishes to define itself, but no more than pointers as to how this might affect our approach to the CJPOA.

The first section of this chapter outlined how we might articulate conflicts in liberal societies in terms of the Rawlsian self. It is in these terms that we might articulate the CJPOA as a conflict between the rational and the reasonable and the rational and the unreasonable. On its own this articulation says nothing about the relation between the reasonable and the unreasonable. Two arguments were then presented suggesting that their relation is at least one of mutual construction. The first argument considered broadly how in liberal theory the natural was created in opposition to the civilised; the unreasonable would be associated with the natural as that opposed to, though also created by, the liberal order. This argument on its own can provide little support for the more general theoretical claim concerning liberalism's production of conflict. However, it gave us reason to explore Rawlsian theory to see if a similar kind of process is at work there. So the second argument went to the heart of what is being called here welfare liberalism, the original position of Rawls' theory. It argued that the conception of the person in this position as reasonable demanded another conception of the person as unreasonable. To put it in other terms, and ones that are more pertinent to the issues under discussion, Rawls' original position needs the criminal as the unreasonable.

If we accept this argument then we have learnt something in general terms about liberalism, that it is committed to the production of those who oppose it, the unreasonable or the criminal. In itself this is an important conclusion. We may want to understand the CJPOA within this general structure of conflict production. However, as has already been pointed out, such an understanding may be a little hasty. To properly understand the CJPOA as liberal justice, and more generally to see how the theory of liberalism's production of the criminal is instantiated in practice, we need to see why the CJPOA targets the groups that it does. It is this targetting that the next chapter explores.

Chapter Six: The CJPOA as Liberal Justice

Introduction:

Having spent the last two chapters exploring how liberal justice constructs the unreasonable we now return to a detailed consideration of the CJPOA. In its turn this consideration will deepen our critique of liberal justice.

The last chapter set a background in which we can come to understand the CJPOA as the possible product of a liberal legality. It was seen how the natural, as an un-valued category, is associated with unreasonable and created as means towards the consolidation of the civilised or the reasonable. An exploration of the selection and justification of Rawls' principles of justice revealed a similarly controversial production of the reasonable at work, a production that demanded the creation of the unreasonable or the criminal for its substantiation.

What this analysis could not give us was an understanding of why criminality might be located in certain groups of people. Liberalism may produce the criminal, and we may place the CJPOA within this structure of conflict production. In part, this chapter expands on how this placing might be articulated. However, such a conclusion does not give us a particular understanding of the CJPOA as liberal justice. In addition, this chapter details why the Act is targetted at certain social groupings.

The chapter is divided into five sections. (1) An elucidation of some of the ideas in Foucault's Discipline and Punish allows us to take further our discussion on the nature of crime and the

criminal with which the last chapter concluded, and set up the theoretical framework for what is to follow. (2) One strand of Foucault's argument, how criminality may be targetted, is related to the CJPOA. (3) The other strand of Foucault's argument as it is presented here, how the criminal is created, is again applied to the CJPOA. This application takes the form of a detailed look at the debates on the Act in the House of Commons. These three sections essentially wrap up our investigation of the CJPOA and its relation with liberal justice. Section (4) makes clear what the understanding of this relation might be by reconsidering liberalism's compatibility with the hypothetical demands of the targetted groups in the light of arguments that have been explored since the end of chapter three. Their non-compatibility is to be understood within our understanding of the CJPOA as liberal justice. (5) In conclusion, discussion is broadened out, and it is suggested that this analysis of the CJPOA is equally useful in understanding other trends in our criminal justice system. Thus, it is again through this specific practical application of theory, that our engagement with liberal justice more generally may be deepened.

1. Crime and the production of delinquents:

Discussion of the exclusion of the unreasonable from Rawls' original position in the last chapter led to certain important conclusions. Firstly, that the unreasonable is constructed as excluded. In this sense it may be controversial. Secondly, that this construction is necessary to the reasonable which lies at the heart of the Rawlsian justification of his principles of justice. Thirdly, that analysis of this process may lead us beyond the exclusion of uncontroversial instantiations of the unreasonable, which Rawls may appeal to, to a more general commitment to the construction of the unreasonable. Finally, it was suggested that it is within this general

process of the construction of the unreasonable that we may place the CJPOA as liberal justice. This understanding, as yet, remains a possibility; this chapter establishes it as a plausible reading of the legislation.

As was stressed in the last chapter, the argument that the reasonable needs the unreasonable, and thus the active creation of the unreasonable, cannot as yet show us which groups of people will fill this category of the unreasonable. It is here that it is suggested that the groups targetted by the CJPOA may be an example of groups who fill this category.

So to the CJPOA. As James Morton comments on part 5 of the CJPOA, 'gone are the last vestiges of the old chestnut that trespassers cannot be prosecuted' (a chestnut that was held, it must be said, in spite of all the notices which promised that they would be).¹ Until the Act trespass, with a few limited exceptions, was a civil offence. As a civil offence it related to the behaviour in public between two private individuals. Though the owner-occupier could use reasonable force to eject a trespasser, her most effective remedy would be to gain an order for possession against the trespassers from the High Court or County Court. A criminal offence, on the other hand, relates to behaviour which offends the public or the state. In such cases the police are empowered to act immediately if they believe an offence has been committed.

We can draw three significant conclusions from this criminalisation of trespass in various ways in the CJPOA (to be looked at in more detail below). (1) It makes the trespasser in these circumstances an enemy of the state. As we have argued, and shall see further, the groups targetted by the Act are portrayed precisely as this. (2) It strengthens the rights of owners of

¹ J.Morton, A Guide to the Criminal Justice and Public Order Act 1994, (London, Butterworths, 1994), p.36

land not by giving them any extra rights (trespass has always been an offence, if by and large a civil one) but by saying that people who do trespass are enemies of the state and not just enemies of the landowner. (3) As we have seen not all forms of trespass have been criminalised. Only certain activities on land constitute criminal trespass. Since these activities are carried out by particular groups of people only these people are likely to commit criminal trespass. The Act aims to make enemies of the state out of certain targetted groups, just as it was suggested at the end of chapter three. But to return to our major theme, I suggest that far from being illiberal, by singling out certain ends for discrimination, this targetting is very liberal.

To understand how this may be so we first need to look in some detail at the idea of crime. I take, as a way of understanding the CJPOA as crime, some of the ideas of Michel Foucault. Crime is defined in two related ways. (1) Whilst the civil law is primarily concerned with the rights and duties of individuals between themselves the criminal law is concerned with the duties the individual owes to society.² A criminal therefore, as suggested above, becomes an enemy of society. (2) This difference means a difference in the objects that the law aims to pursue - civil law seeks redress or compensation, criminal law seeks to punish.³

It is on this connection between the punishment and the relation of the individual to society that Foucault's Discipline and Punish⁴ focusses. The foundations of the right to punish lie in

2 See R.Card, Criminal law, (London/Dublin/Edinburgh, Butterworths, 1995),p.1. As the importance of public society grew so did the number of criminal offences. See C.Clarkson, Understanding Criminal Law, (London, Fontana, 1987), p.14, for an account of the gradual extension of offences. Before Anglo-Saxon times only witchcraft and incest were criminal offences. Offences such as theft and murder were seen as only affecting the victim and not as constituting a public wrong.

3 W.Geldart, Introduction to English law, ed. D.Yardley, (Oxford, Oxford University Press, 1991), p.153. For more detail see J.Adams and R.Brownword, Understanding Law, (London, Fontana, 1992), ch.6.

4 Discipline and Punish, trans. A.Sheridan, (Harmondsworth, Penguin, 1991), p.303. Foucault's philosophical histories have been criticised; J.Merquior, Foucault, (London, Fontana, 1985), p.97, says that Foucault prefers 'ideological drama to the wayward contingencies of actual history', and, p.99, that he presents us with a 'brazen historical caricature'; for a general survey of Foucault's ability as a historian see Merquior, pp.96-107). However, to focus too much on these possible problems

the notion of the society which the criminal is supposed to have offended. In the classical age, Foucault argues, the law was the expression of the will of the sovereign; someone who broke this law was therefore attacking the sovereign.⁵ Here it is relatively easy to see the justification for punishment. Power lies with the sovereign. To cross that power is to leave oneself open to the will of that sovereign. It is not quite so obvious when the law is not the expression of a single will but the result of a contract between the members of that society as rational wills. As Foucault says this theory of the contract leaves the criminal as a 'juridically paradoxical being'. On the one hand he has broken the rules by which he agreed he may be punished. Yet, as a member of society, he participates in his own punishment.⁶ It is within this transition between the law as founded in the sovereign and the law founded in the contract that Foucault considers changing methods of punishment. Of course, the approach to law chosen for consideration here, that of Rawls, is similarly based on a contract, albeit a quasi one. Why, on this basis, should we tolerate being punished? Foucault answers: 'The theory of the contract can only answer this question by the fiction of a juridical subject giving to others the power to exercise over him the right that he himself possesses over them. It is highly probable that the great carceral continuum, which provides a communication between the power of discipline and the power of the law, and extends without interruption from the smallest coercions to the longest penal detention, constituted the technical and real, immediately material counterpart of that chimerical granting of the right to punish.'⁷

This answer points to two theories of the foundations of punishment. Firstly, there is the

would be to ignore how Foucault's ideas can help to give an interpretation of the present, or in his words, history as writing the 'history of the present', *Discipline and Punish*, p.31. It is important to note that Foucault's intention is not to write a history of the prison, but rather to give a study of disciplinary technology; see H.Dreyfus and P.Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, (Brighton, Harvester Press, 1982), p.144.

5 Foucault, *Discipline and Punish*, p.47

6 *Ibid.*, p.90

7 *Ibid.*, p.303

contract made between equal juridical subjects, as we have looked at in Rawls' theory. But, Foucault argues, on its own this contract is not enough to explain why these subjects 'subject' themselves to punishment. This subjection can only be achieved within a whole system of disciplining the individual, what Foucault refers to above as the carceral continuum, with the prison as its focus. Only disciplined individuals will be prepared to be punished. Thus the foundations of punishment are not the contract between equal juridical subjects but rather the system of discipline and control which operates in the school, the hospital, the workplace, creating in us the subjection necessary for prison. Or at least it is not only the fiction of a social contract.

Certainly it is a useful fiction for contract theorists to have us believe that we are subjects who create and found the law rather than objects subjected to it. Anne Barron argues that 'Liberalism, in theorising power as sovereign power, and sovereign power as the relationship between abstract *subjects* - each characterised by an autonomous, responsible will - and the law, ignores those practices of government by which living individuals becomes the *objects* of detailed manipulation and management.'⁸

However, there is a further aspect of Foucault's explorations of the connection between discipline and punishment that is of relevant interest here. With the law as the expression of the sovereign's will punishment tended to be directly inscribed onto the body of the criminal; thus the great public spectacles of torture and execution as displays of the power of the sovereign. Imprisonment, on the other hand, works on the 'soul' of the criminal. It is a

⁸ Barron, 'Legal discourse and the colonisation of the self in the modern state', p.109. Barron's article follows a line similar to that argued here. She focuses on how the shift to end-orientated legislation in the modern welfare state has been obscured by liberalism's theorisation of law as prescribing a formal equality of rights between abstract subjects allowing them to choose their own ends.

deprivation of rights, an attempt to rehabilitate, to treat. Other bodies of knowledge than just the judicial become involved in this punishment.⁹ The criminal becomes the focus of punishment rather than the crime. These other bodies of knowledge define a set of norms which the criminal acts against, and it is part of the system of disciplinary punishment to make the criminal conform to these norms. In a sense this means that the prison takes over from the judiciary as the place where justice is carried out, for what is important is not the offence for which the criminal was imprisoned but the individualising of the penalty towards his reformation.¹⁰ Foucault argues that what the prison operates with is in effect not the convicted offender but the delinquent. He is 'to be distinguished from the offender by the fact that it is not so much his act as his life that is relevant in characterising him.'¹¹ What we have here are two interconnected processes. The prison as part of an overall system of discipline; within the carceral continuum a connection is made between a transgression of the law and deviation from a norm. The imprisoned criminal therefore becomes the abnormal, the social deviant. He brings with him 'the multiple danger of disorder, crime and madness'.¹² But the prison is also productive of a certain type of abnormality, defined as delinquent. And this delinquency is important in establishing the validity of norms. So, in effect, criminals are needed to establish these norms. Therefore society must create criminals. How these criminals are created throws up other possibly striking parallels with the CJPOA.

Before we explore these parallels, it is important to relate the position reached with Foucault's

9 Foucault, *Discipline and Punish*, p.19, comments that 'A whole set of assessing, diagnostic, prognostic, normative judgements concerning the criminal have become lodged in the framework of penal judgement.' These judgements are in turn part of a broader process of discipline within society, 'a functioning of power...on those one supervises, trains and corrects, over madmen, children at home and at school, the colonised, over those who are stuck at a machine and supervised for the rest of their lives', p.29.

10 For the prison to operate successfully as a reformatory it needs to have certain rights over the prisoner, in particular the right to modulate his sentence; *ibid.*, p.244

11 *Ibid.*, p.251

12 *Ibid.*, p.300

analysis of the production of criminals with the claimed production of the unreasonable in Rawls' original position as argued for in the last chapter. Foucault's argument suggests that through exploration of the role of prison as punishment we can see how the criminal is created as means of confirming the norm of the non-criminal. In the same way it was argued in the last chapter that the criminal as the unreasonable is needed by Rawls to substantiate his conception of the reasonable. It was also suggested that the Rawlsian conception of the reasonable does not just depend on uncontroversial instances of the unreasonable but may also be committed to the construction of controversial placings of the unreasonable. Foucault's analysis of imprisonment gives us an understanding of how this might happen in practice.

Again, of course, as with imperialism's construction of the savage, it may be argued that Foucault's discussion merely provides empirical support to the main critique of liberal justice, and thus can tell us little about Rawls' theory - it may be historically contingent. But this objection would be to miss the point that is being developed here: the last chapter created an opening in Rawls in which this analysis might take place. Consideration of Foucault here is not about support for the critique of the Rawlsian production of the unreasonable. Rather, it is that, given the opening developed, Foucault may help us to see how the CJPOA is part of liberal justice. The point being expressed may be put otherwise. It has been argued that the construction of the unreasonable is a central part of the liberal project. Now, who fills this category of the unreasonable may be a matter of historical accident insofar as it could have been some other group. It is in this sense that the reading being developed here of the CJPOA as liberal justice is only a possible reading: it could be otherwise. But that this process of the construction and exclusion of the unreasonable is necessary to the Rawlsian project then some group needs to fill this category: accepting this, and other discussion of the CJPOA in these

terms later in this chapter, we might certainly say that the reading given here of the CJPOA is a plausible one.

Before the late eighteenth century, Foucault argues, each social strata had a margin of tolerated illegality. This toleration, in the case of each social grouping, disappeared under growing economic pressures and wealth. For example the transition to intensive agriculture necessitated the end of tolerated rights of commoners over land. The practice of these rights now became theft: 'The illegality of rights, which often meant the survival of the most deprived, tended, with the new status of property, to become an illegality of property. It then had to be punished.'¹³ In particular the illegalities of the peasantry and working-class were attacked. We might see, in a different way but within the same model, the criminalisation of trespass in the CJPOA, in effect a strengthening of property rights, as property rights proscribing certain previously tolerated activities. Foucault's argument also provides a possible understanding of why these measures are aimed at certain groups. In other words illegalities may be tolerated for some but not for others.

What Foucault refers to as this 'differential administration of illegality through the mediation of penalty'¹⁴ helps us understand what might be regarded as the 'failure' of the prisons. Prison was immediately denounced as a failure on its widespread introduction one hundred and fifty years ago. It was argued that prison did not reduce the crime rate, caused recidivism, produced delinquency and allowed criminals to organise together.¹⁵ The same criticisms have been repeated ever since. We can only understand this failure of prison in tackling crime if we

13 Ibid., p.85

14 Ibid., p.272

15 Ibid., pp.264-69

go back to the differential administration of tolerated illegalities for it is in fact in the interest of those with power that prison fails to reduce crime. Criminal law, as the law of one particular class addressed to another, manages to produce 'the delinquent as pathological subject', the criminal type who offends again and again. This location of crime in certain economic/social groupings, appears to have two main consequences. (1) It is a way of controlling other popular illegalities. Differentiated from them it can no longer rely on popular support, and it turns inwards and attacks its own popular base. (2) It reinforces the norm of the non-delinquent. It is important to see, however, how the delinquent criminal is a creation of the disciplinary system and prison in particular. The criminal doesn't simply commit an offence by chance: 'it is not crime that alienates an individual from society, but that crime is itself due rather to the fact that one is in society as an alien.'¹⁶

We come back to the criminal as the enemy of society. We can see now that the criminal doesn't simply make himself an enemy of society by transgressing its rules as the expression of a contract between rational wills. He is also created as a criminal. We mustn't see the definition of crimes and punitive measures as merely negative functions aimed at preventing certain types of behaviour. Rather they also function as positive measures designed to establish a certain norm of behaviour which the criminals must necessarily transgress.¹⁷

It is useful perhaps to contrast the criminal's relationship with society in 'disciplinary' society,

¹⁶ Ibid., pp.275-6. Merquior, Foucault, p.107, criticises Foucault for suggesting that the purported failure of prison is in fact its success in producing delinquents without showing any causal mechanisms at work. Certainly, the idea is more assertion than argument, and yet it is the kind of assertion which can give us valuable insights into what kind of context the CJPOA might be operating in, as will be argued in the remainder of this chapter.

¹⁷ Foucault, *Discipline and Punish*, p.24: 'punitive measures are not simply 'negative' mechanisms that make it possible to repress, to prevent, to exclude to eliminate...they are linked to a whole series of positive and useful effects which it is their task to support (and, in this sense, although legal punishment is carried out in order to punish offences, one might say that the definition of offences and their prosecution are carried out in order to maintain the punitive mechanisms and their functions.)'

the type outlined above, with her relationship with societies with other power structures. Under the power of the sovereign the criminal is an outcast from society, often physically extinguished by the power of the sovereign. For the reformers and their contract of abstract juridical subjects the criminal was labelled enemy or outcast but the intention was to integrate them back into society. For the disciplinary society finally, the criminal is both outcast but right at the centre of society, his very status as outcast enemy being central to the operation of the law.

The last chapter on Rawls concluded that some notion of the unreasonable, or the criminal, is central to the characterisation of the parties to the original position as reasonable. More specifically it was argued that the unreasonable is constructed in this process, and that this construction might involve controversial conceptions of the unreasonable. That is, it might involve the situating of the unreasonable on ways of life that are not paradigmatic instances of the unreasonable. Now, in applying this theoretical critique to some practical issue there is obviously going to be some lack of conclusiveness. It might simply be objected that the application is wrong. Therefore at the end of the last chapter the placing of the CJPOA within this model of the production of the unreasonable was resisted. In particular we could get no grip on why the specific groups targetted by the CJPOA might be targetted as part of this process. Foucault, however, has allowed us to understand the CJPOA more clearly as part of liberal justice within this system of conflict production. We have seen how, in part, the delinquent within the criminal justice system is a creation of the targetting of specific social groupings. Thus the groups criminalised in CJPOA may be targetted in this way. Most of the rest of this chapter is an attempt to substantiate this interpretation using some of the

conclusions of Foucault.¹⁸ These conclusions may be summarised: (1) the criminal law does not pick out enemies of the state who are somehow already there, but is part of the process of their creation; (2) this creation of the criminal as delinquent depends upon locating criminality within certain groups of people. I take up these points, in reverse order, with direct reference to the CJPOA in the next two sections.

However, to return to the possibility of misunderstanding theory through attaching practical consequences to it that don't necessarily follow, it is important to see the kind of argument that is being pursued here. Analysis of Rawls' conception of the reasonable exposed an opening for controversial productions of the unreasonable. Foucault has given us an understanding of how this production might involve targetting specific groups. So Foucault takes our understanding of Rawls further. It may only be a contingent understanding since Foucault's arguments may express something about a historically specific liberalism, which does not apply to Rawls. So when, as happens in the next two sections, the groups targetted by the CJPOA are considered within this developed theory of the Rawlsian production of the unreasonable, it is not being asserted that any conclusions come to tell us anything definitely about the CJPOA as liberal justice and thus more generally about Rawlsian justice. Rather, it is simply that given our discussion on Rawls in the previous chapter, these conclusions may be plausible conclusions to come to, insofar as they are consistent with our reading and extend our understanding of Rawls.

18 There may be another, connected interpretation which I do not explore here. David Rose, *In the Name of the Law*, (London, Vintage, 1996), p.335, suggests that the recent harshening of prison sentences under the Conservatives, continued by Labour, is a reassertion of state power 'through exemplary punishment for the minority who have been convicted'. He argues that this reassertion is a reaction to the belief, held with increasing strength, that people will not be punished for their criminal actions. It thus marks, in a sense, a return, to the power of the sovereign. Such a reassertion of this power might well be understood as wanting to target certain groups as in the CJPOA.

Before we explore what these conclusions might be it is worth noting what might perhaps be points of difference and convergence between my argument and that of Foucault. He argues that there is law and discipline; the self of law is the abstract juridical subject, the self of discipline is the normalised self. It is the level of discipline that is important. Law and its abstract subject may serve to obscure the processes of normalisation, but it is in these processes that the abnormal is compared to the normal, the delinquent criminal to the law-abiding citizen. My argument so far has rested on the level of the abstract juridical subject, or the equal rational and reasonable choosers of the original position. The processes of power that may dictate the characterisation of these parties would be an important area to explore further. Some indications of these possible processes are given in what follows.

2. 'A differential administration of illegalities':

So to the location of criminality within certain groups. The CJPOA contains a range of measures to strengthen the protection of private property in land, which were looked at in chapter one. Some of these measures, such as that allowing the swifter eviction of squatters (sections 72-76), apply equally across the board. On the other hand, and perhaps most obviously, the offence of aggravated trespass (sections 68-69) appears to offer a rather different protection of private property. Under this new law a person commits a criminal offence if she is trespassing on land with the intent of disrupting some lawful activity taking place on that land. This law is aimed at the activities of eco-protesters, hunt saboteurs and road protesters. By being so aimed it strengthens the rights of hunters, for example, to do what they want on their own land, and those people whose land they have contracted to use. What it does not address, nor is it addressed anywhere else in the Act, are the rights of those

who do not want hunters trespassing on their land. Unsurprisingly, the measure was welcomed by the Masters of Foxhounds and owners of pheasant shoots.¹⁹

This apparent privileging of one group is raised in debates on the Act in the Commons. The Home Secretary, Michael Howard, argued that 'The new powers that we propose to introduce apply to all those who trespass and seek to disrupt the lawful activities of others. They are not confined to any particular set of circumstances;²⁰ on the other hand, his Tory colleague MP Roger Gale argued that it is not good enough only to address the problem of 'violent' protesters 'without giving the ordinary householder, cottage owner, smallholder or small farmer the right to decide whom he or she wants to have on his or her land.'²¹ It is also pointed out that the law would apply equally to hunts if they were to have the intention of disrupting some lawful activity whilst trespassing on land, but since they would never have this intention this issue would not actually arise.²² And under the Act no hunter has been found guilty of criminal trespass whilst numerous saboteurs have.

So this measure of aggravated trespass offers only a limited strengthening of the protection of private property. It is strengthened in regard of some people but not of others. This criminalising of trespass aimed only at certain groups is also apparent in other measures, although it is not as obvious as in the case of aggravated trespass since there are not two groups which may in fact be trespassing at the same time. The provisions against travellers (sections 61-62 and 77-80) and raves (sections 63-65) are only likely to be used against people

¹⁹ Morton, Guide to the Criminal Justice and Public Order Act 1994, p.38

²⁰ Hansard, 11.1.94, p.29

²¹ Hansard, 13.4.94, p.301-02.

²² Hansard, 12.4.94, p.106. Card and Ward, The Criminal Justice and Public Order Act 1994, pp.53-54, comment on the importance of intention here: 'trespassing huntsmen who know that their conduct, or the conduct of their pack, will terrify a frail couple in the garden in which they trespass, but who do not aim that conduct to have this effect, cannot be guilty under s68, even if it could be said that they had acted in relation to a lawful activity in which the couple were engaging.'

from these groups. For example the need for one hundred people to be involved for the provisions against raves to come into force automatically angles the legislation towards younger people and certain social groupings for this number threshold means that they are not likely to apply to garden parties although such parties may produce just as much noise. Card and Ward comment: 'it appears that a distinction is to be perceived between raves, which are attended by youngsters, and garden parties, which are more likely to be attended by those of an older generation, a distinction not necessarily based on the volume of noise generated.'²³

The Act therefore provides something more sophisticated than a simple strengthening of private property rights, as already suggested, but also something more sinister. Foucault's point concerning the varying tolerance shown towards illegalities seems to be substantiated here. He argues that in particular the strengthening of property rights affects the tolerated illegalities of some social groups more than others. Now criminalising what was a civil offence does not necessarily mean that an illegality that was previously tolerated is no longer tolerated. It may not have been tolerated as a civil offence. However, criminalising it says in effect that we as a society will no longer tolerate it. It is saying that if you trespass with the intention of disrupting a lawful activity we as a society cannot let such action go unpunished, whereas if you trespass without such intention, though it is a wrong, we as society have no right to take action against you; the wrong done is merely against another person. So as far as the social body is concerned Foucault's argument does seem to enable us towards a possible understanding of the directing of the provisions of the Act towards certain groups.

This targetting of specific groupings is linked, it was argued, with the creation of the criminal

²³ Ibid., p.68

as delinquent. It is part of the process of delinquent production. By differentiating these groups they are created as delinquent. I now go on to look at how the groups targetted by the CJPOA are portrayed in debates on the Act. I suggest that portrayed as delinquent they can then be legislated against. Thus, to return to Foucault, their crimes are not ones of chance, but are due to the fact that they are already in society as delinquents. The argument is also more complicated than this. Confirming our analysis of the reasonable in Rawls and the norm in Foucault we see how the particular depiction of the targetted groups in these debates is central to the construction in opposition of a vision of the Britain that these measures aim to preserve, or more accurately perhaps, create. In essence, I shall argue, the two visions are essential to each other.

3. Country and city: or the creation of the delinquent:

Analysis of the debates in the House of Commons on the CJPOA, or more accurately Bill as it would have been then, is one way of exploring how the targetted groups are created as delinquent. There may be other ways, such as exploring the minutes of committee meetings on the legislation, or judicial and academic writings. It is, nonetheless, an interesting and productive task. It gives us some idea of the intent behind the Act, and in its at least implicit, and sometimes explicit, use of the countryside and the city as categories which indicate certain ways of life, it points towards a wider debate in which they depend upon each other. I suggest that the city is associated with the groups targetted by the CJPOA; as a category it is constructed through its opposition to the country just as the unreasonable is constructed through its opposition to the reasonable.

Part 5 of the Act is, it seems, intended to deal with the problem of public order in the countryside. Michael Howard in introducing part 5 says it is 'designed to tackle the destruction and the distress caused mainly to rural communities by trespassers.'²⁴ Sir Cranley Onslow suggests that it strengthens 'the position of those who want law and order to prevail in the countryside.'²⁵ Sir Cranley's continuing that it should protect the proceedings of 'countryside sports' should give us an idea of what kind of countryside he has in mind. Land in the Act does not include buildings other than agricultural buildings and scheduled ancient monuments such as Stonehenge. Card and Ward assert that the 'mischief' the Act is aimed at is to do with agricultural and rural land.²⁶ I suggest that a particular construction of this countryside manages to create, in opposition to it, those targetted by the Act as enemies of the state as it is embodied in this version of the countryside. This argument is made more interesting by the recent revived interest in the meaning of the countryside consequent to the Private Member's Bill in Parliament proposing the banning of the hunting of wild mammals with dogs, and the mobilisation of a certain version of the countryside in opposition to this proposal. I return to these complexities, which actually support my argument here, after considering the country and the city as we find it in debates on the CJPOA.

Sir Cranley Onslow (again) asserts that it 'is a disgrace that organised violence, deliberate provocation and physical assaults on people and animals have become an acceptable way of life for a militant section of urban society. The saboteur movement has its roots not in the countryside but in the towns. Anyone who has seen busloads of Millwall supporters brought in to disrupt a hunt knows exactly what I am talking about.'²⁷ Note in particular how Onslow's

²⁴ Hansard, 11.1.94, p.29

²⁵ Hansard, 11.1.94, p.46.

²⁶ Card and Ward, The Criminal Justice and Public Order Act 1994, p.38

²⁷ Hansard, 11.1.94, p.47

setting up of the city/country distinction precludes those from the city in making judgements or being able to do anything about what goes on in the countryside.²⁸ They are the worst kind of people from the city, Millwall supporters, the most notorious hooligans in football history.

Nor was this demonising of the city confined to the rantings of backbenchers in the Tory party. Ann Winterton, a government minister, welcomes the measures 'to tackle these hooligans, thugs, vandals and anarchists who, disguising their malice and anti-social tendencies with a thin cloak of compassion for animal welfare, delight in bringing havoc, injury and fear to the many law-abiding citizens who seek to exercise their right to participate in field and country sports.'²⁹ Again the protesters are designated by those most dreaded of city types, the hooligan and the anarchist. In this designation they are contrasted with the law-abiding citizens of the countryside peacefully pursuing their countryside sports.

A third example of this country/city divide provides an interesting further angle on the problem. In the same debate Sir Anthony Grant says, 'There has been a great and worrying increase in rural crime in places and villages in my constituency which did not suffer from the experiences which are all too common in our cities.' Furthermore, 'People in rural areas are fed up to the back teeth with the nuisance and annoyance caused by so-called travellers and ghastly raves.'³⁰ The argument is then that it is the people from the cities, the so-called (always a most deprecating term of abuse) travellers and ghastly ravers, who are bringing their criminal ways to the country. McKay comments that the festival network, which has formed

²⁸ As we shall see later, it is this idea of two worlds, with the urban knowing nothing of the country, that is central to current arguments over the future of the countryside, fuelled by proposals to ban fox-hunting. The occupation of land near St. George's Hill in Surrey in April 1995 also brought the response from the farmer whose land was occupied that he knew far more about farming than the protesters. See J. Vidal, 'Peaks and troughs', *The Guardian*, 26.4.95, p.4 environment pages.

²⁹ *Hansard*, 11.1.94, p.80

³⁰ *Hansard*, 11.1.94, p.96

the focus of much counter-cultural activity, does bring the city to the countryside.³¹ In a very practical sense this may be true. What is interesting though is how the opposition between the city and countryside construct each other through the Act, and in particular the values that are given to each in this process.

The idea of the city invading the countryside is, as Williams explains in The Country and the City hardly a new one. To take just one example from the post-feudal period which saw a growth in the size and extent of towns and their influence in the countryside. The new money of the mercantile classes buying its way into the countryside of gentlemen was seen as 'a kind of infection from the city.'³² But as Williams points out this depiction of the city as infection hides the fact that the profits made in the cities are based largely on the exploitation of rural labourers, profits which then run back to the landed estates and improved systems of exploitation.³³ It is exactly this process of valuing the country and city in certain ways that are opposed to each other, and hiding ways in which they are related to each other, that we see happening in the CJPOA.

There are three aspects of this process as revealed in the above quotations from the debate that I wish to explore. (1) There is the scapegoating of certain groups, a creation of them as criminal enemies of the state;³⁴ (2) there is the inversion of values associated with city and

31 McKay, Senseless Acts of Beauty, p.12. Sometimes this encroachment of the city on the countryside takes a very symbolic form in its situating itself within spaces that define Englishness (as considered in more detail later in this section), such as the Windsor and Stonehenge free festivals of the '70s and '80s. Nowadays it is perhaps more apparent in the creation of temporary cities in the countryside such as those at Castlemorton and Glastonbury.

32 See R. Williams, The Country and City, (London, Hogarth Press, 1993), p.49. Williams' broader point is that the country/city contrast has been a political tool in the hands of capitalism through its location of the problems created by the growth of capitalism in the place of urban industrialism, the city, rather than in the capitalist process itself.

33 *Ibid.*, p.48

34 This talk of enemies of the state may appear to put it very strongly, though there is a clear enough sense in which criminals are enemies of the state as outlined earlier in the chapter. Two qualifications may be needed: (1) they are only enemies if they commit the proscribed actions; (2) they are not enemies in the way that terrorists are, for example. Even this needs qualification, however, for in fact MI5 are investing much time and energy on the activities of eco-protectors in particular.

country which run counter apparently to the opposition built up so far in which the natural is associated with the unreasonable, the civilised with the reasonable; (3) the images of Britain that are created through this inversion and which are aimed at sustaining (1).

So to the scapegoating: it can of course be objected to Grant and company, as several MPs did in discussing the Bill, that travellers and ravers are hardly the cause in rising rural crime, but merely the scapegoats for deeper social problems that the Tory party failed to address. During the debate it was suggested that these groups are false targets. Labour tried to pass an amendment that prevention and causes of crime also be considered.³⁵ Jean Corston criticises the Bill for its likely lack of effectiveness; instead of a Bill concerned with crime prevention and funding we 'have a Bill that is concerned with squatters, hunt saboteurs and travellers...The problem with the Bill is that the price will be paid by the young, the vulnerable, the inarticulate, the mentally ill and the homeless.'³⁶ Mr. Wilson takes the point further, suggesting that Michael Howard at the Tory party conference in 1993 tried 'to chill the delegates to the marrow by raising the spectre of threats to society as we know it'. Two 'particular bogies' are set up, travellers and hunt sabs which then have to be legislated against.³⁷ As Mr. Graham points out in the same debate, 'The government are trying to crack an ant and use a tank.'³⁸

But not only does the Act fail to address the real problems of crime, creating scapegoats instead, it also creates new categories of criminal. Andrew Bennett suggests, 'It would be far better if the Government concentrated their efforts on those people who have been committing

³⁵ Hansard, 11.1.94, pp.34-5

³⁶ Hansard, 11.1.94, p.75

³⁷ Hansard, 13.4.94, pp. 370-1

³⁸ Hansard, 13.4.94, p.375. Dr. Godman, in the same debate, suggests that the legislation is aimed at what the government perceives to be 'subversive groups', p.376.

crimes rather than trying to increase the categories of crime.³⁹ And yet this approach is hardly the 'ironic' one that he takes it to be. In fact, as might be obvious from preceding arguments and will certainly become clear by the end of this section, this creation of criminal enemies is very much connected to the perpetuation of liberal law.

This creation of enemies is connected to the city/country inversion. It is an inversion because it seems that the unreasonable, far from being associated with the natural, is now being placed in the city. The countryside, or the natural, is, in contrast, the home of the reasonable law-abiding citizen. Remember that it was suggested earlier that our attitudes towards nature are complicated. Thus the people of the east were seen as both primitive barbarians and noble savages, in effect providing a justification and critique of our own civilisation. Such ambivalence is also present in our attitude towards the nature that is not the city. As Soper argues, whilst the natural is a site of danger it also represents that which is beyond culture, an organic, less alienated way of life. Williams suggests that the city as well has both positive and negative associations: 'On the country has gathered the idea of a natural way of life: of peace, innocence and rural virtue. On the city has gathered the idea of an achieved centre: of learning, communication, light. Powerful hostile associations have also developed: on the city as a place of noise, worldliness and ambition; on the country as a place of backwardness, ignorance and limitation.'⁴⁰

Bauman suggests that the city represented in physical form modernity's 'search for structure in a world suddenly denuded of structure'. For in 'the city of reason there were to be no winding roads, no cul-de-sacs and no unattended sites left to chance - and thus no vagabonds, vagrants

³⁹ Hansard, 13.4.94, p.305

⁴⁰ Williams, *The Country and the City*, p.1.

or nomads.⁴¹ And yet now, as we have seen, the city is the very place of the vagabond, the outlaw. It is perhaps in this transformation that we can understand how the countryside has been constructed in opposition to it. For this dream of the city of reason could only ever be that, a dream, especially in our increasingly heterogeneous cities. Bauman argues that today's city is the place of strangers, those who we cannot assign to a type, with whom we are unaware of any rules as to how to deal with them.⁴² He argues that having such strangers within our physical spacing is a relatively recent phenomenon. Cities are designed precisely so that we don't have to engage with strangers, its spaces are spaces to move through, not be in.⁴³ Bauman continues that modern life also needs strangers. Having no emotional value they are those who we can do business with: 'Were there no strangers, one may say, they would need to be invented...And they are - daily, and on a massive scale.'⁴⁴ So, strangers or aliens, delinquents, the vagabonds and nomads that the city of reason was supposed to assign a social role to, are invented for a different reason, as a way of confirming the reasonableness of the non-stranger. So by way of invention and of fact the city has become precisely that lack of structure, that unknownness where reason cannot reach, fears of which it was hoped it would allay. With the collapse of this dream order had to be desperately sought elsewhere, and where else could it be found but in that which the city was defined against, or the countryside.

We have already seen the particular construction of the countryside as a place of virtue and order. We see this construction in the eulogising of the pastoral poets for the lost Arcadian era, an era that each generation of artists seems to imagine has existed only shortly before their own time.⁴⁵ In our own age we can see this evocation of the lost golden age in much new

41 Bauman, *Intimations of Postmodernity*, p.xv

42 Bauman, *Postmodern Ethics*, p.149

43 *Ibid.*, p.157

44 *Ibid.*, p.160

45 Williams, *The Country and the City*, p.8, calls this phenomenon the 'escalator' of pastoral writing. See also Soper, *What is*

age thinking. The dangers of such forms of critique of present conditions are probably clear. Such critiques, as Williams points out, are all too often based on an appeal to a rural order sustained by hierarchy and inequality. This line hardly seems likely to be that proposed by our Tory MPs insofar as they are not going to criticise as a whole a way of life they have done most to create and wish to sustain. Rather their aim would seem to be to create a version of the countryside by opposing it only to certain groups in society. In this creation they manage to hide the toughness of the system they are defending. Essentially this hankering after a more 'natural' way of life can too often be a cancelling of history itself, a reconstruction of the natural that excludes the economic and political conditions that lay behind it. The peasant is depicted as perfectly happy in his work; the toughness of the labour is excluded, the poverty is seen as a virtue.⁴⁶

No doubt there may well be some of this cancelling of history in our honourable friends' comments on the city/countryside divide quoted above, especially since this setting up of the rural as the place of law and order serves to support ways of life which are explicitly based on exploitative class-structures. Fox hunting provides just one particularly potent example.⁴⁷

However, we can reach a more sophisticated conclusion if we keep in mind how this is a

Nature?, p.191.

46 See Soper, What is Nature?, pp.191-2. Soper, p.194, also comments on how advertisements use a rural idyll to sell their products, which serves to cancel the harm that these products are in fact doing to the environment. Williams, The Country and the City, p.37, comments that these appeals to a natural subsistence agriculture before the onset of market relations tends to ignore the fact that 'the social order within which this agriculture was practised was as hard and as brutal as anything later experienced'. Paul Evans, (Chair of the British Association of Nature Conservationists), 'Natural enemies', The Guardian, 9.7.97, environment pp.4-5, gives a similar critique of an idealised countryside: he suggests further that this ideal is falling apart under a growing awareness of the plurality of values that exist in both the countryside and city, a plurality that undercuts any possibility of an imaginative homogenous whole. In addition it may be plausibly argued that the city/country contrast is increasingly unclear in a physical environment which some geographers now refer to as rurban; see H.Lefebvre, Writings on Cities, ed. and trans. E.Kofman and E.Lebas, (Oxford, Blackwell, 1996), p.120. But as should be clear by now the contrast is a matter of political creation rather than physical fact.

47 The argument that fox-hunting in fact involves all members of the rural communities where it takes place does little to counter this point. For this inclusiveness can be part of the structure of exploitation; feudalism provides one particularly pertinent example. The fact that fox-hunting is no longer the preserve of the upper-class, and therefore should not be addressed in class terms, has been one of the main arguments given by supporters of it in recent debates over its future. These arguments have been taken on board by commentators on this debate, who proclaim themselves personally to be against fox-hunting. See, for example, John Vidal, 'Town and country', The Guardian, 9.7.97, p.17.

partial vision of the countryside sustained by an opposition to a partial vision of the urban. The nature or countryside of Onslow or Grant is a tamed nature, or at least that is the way they would like it to be seen. Its social structure is also tamed, secure. One constantly reads in the debates on the Bill about the communities that exist in rural Britain, as if it were unaffected by the march of individualisation present in urban areas. Conflicting sites of power must therefore be designated as coming from outside the countryside, from its opposite, the city. Such sites of power threaten the stability of this class-ridden rural idyll. Consequently they are constructed as other to it. Furthermore this construction takes place, as mentioned earlier, in terms of the property rights of particular people. The image of the countryside presented is such that its naturalness presents no threats to the property rights held over it; its naturalness is in fact part of its stability. So the limits of property, its boundaries of appropriation of the world, must lie in something that is not natural, or the city.

A particular conception of the countryside is therefore constructed in opposition to the city. This conception is linked to the protection of particular property rights, as the Act was outlined in the last section. I suggest that this process happens in at least two ways. Firstly, and as we have considered in regard to the law of aggravated trespass, the protection of these rights perpetuates this rural idyll of country sports and unalienated communities which is, in fact, merely the monopoly of big landowners.

Secondly, there is a placing of what it means to be English in the vision of the countryside that these property rights aim to protect. On a general level both Williams and Soper note a correspondence between the disappearance of rural life as the predominant way of life for

people in Britain and its presentation as what it means to be essentially English.⁴⁸ Stonehenge presents a particularly potent example of this creation of a national identity since it is a site of conflict, symbolic and real, between people who would conceive their relationship with it in different ways. And it is of course exactly the kind of free festivals that were held Stonehenge from the mid-seventies to the mid-eighties that the CJPOA is aimed, preceded by the slightly less draconian Public Order Act of 1986 which was passed in the aftermath of the infamous Battle of the Beanfield. Barbara Bender traces changing conceptions of the stones through history. Medieval Stonehenge was physically and intellectually appropriated by the Church, with a religious order placed nearby and the stones being attributed to the devil.⁴⁹ By the seventeenth century the stones were seen in both a utilitarian manner, as suitable building material, and as having supernatural significance. They had also begun to be appropriated as part of the national tradition.⁵⁰ Today of course Stonehenge has become a museum that attempts to sell a particular version of the English tradition. Alternative interpretations of this tradition are thus denied. Its presentation as a monument manages to hide the economic and social conditions that created it.⁵¹

Its presentation as such denies as well that it may still be a living space. It is frozen at some point in the past. For travellers and other festival goers it was somewhere to be, though they too created their own tradition connecting them to the stones. McKay comments here:

'Latching onto the solstice rituals of Druids at Stonehenge which themselves go back only to

48 See Williams, *The Country and the City*, p.2 and Soper, *What is Nature?*, p.196. Most of our countryside today is not a patchwork of meadows and hedgerows but rather an industrial landscape. P.Evans and J.Theobald, 'Just a field of dreams', *The Guardian*, 12.10.94, environment pages 4-5, comment that the further we are excluded from this landscape through its industrialisation the more aesthetic our imagined relationship with it becomes.

49 B.Bender, 'Stonehenge- contested landscapes', *Landscape: Politics and Perspectives*, ed. B.Bender, (Providence/Oxford, Berg, 1993), p.254

50 *Ibid.*, pp.258-64

51 *Ibid.*, p.269. In broader terms the National Trust has been forced to consider whose nation it is protecting as it evicts travellers from its land. Certainly it is not a nation of which all can be part. See Oliver Tickell, 'Settling for second best', *The Guardian*, 2.8.95, environment pages 5.

the turn of the century, the hippies invent an instant and powerful tradition.⁵² Stonehenge as museum also contrasts with other attempts of the heritage industry's desire to portray a certain kind of ideal. As Soper points out the country house is recreated as if it were lived in, and its occupants have temporarily vacated it. 'In the process, the fantasy of the visitor's personal occupation of the premises is the more directly encouraged, and becomes an important element in the fiction that the country house is a 'common property' belonging to us all - and thus in projecting an image of the past as less socially divisive or even as more 'naturally' harmonious.⁵³ Furthermore, symbolic of our national identity, the country house-as-lived-in manages to elide private ownership (the present owners are after all making money from their historical explorations) into public trusteeship.⁵⁴

However, whether as museum or living space, the point concerning the heritage conception of England remains the same: it presents a version of the past which is not only partial but serves certain interests in the present.⁵⁵ I suggest that some of these interests are the exclusion of the groups targetted by the CJPOA. McKay argues that it wasn't Stonehenge that the police were trying to protect in the Battle of the Beanfield in 1985. Rather it was aimed at breaking the travellers' peace convoy and stopping the free festival.⁵⁶ I doubt that this conclusion is complex enough for it was by creating a certain conception of the stones as a site of Englishness that the festival was invented as a site of the enemies of this Englishness. Therefore the stones had to be appropriated back from them as a symbolic definition of their creation as enemies. And this dynamic opposition between certain groups as enemies and a particular image of England

52 McKay, *Senseless Acts of Beauty*, p.18.

53 Soper, *What is Nature?*, p.199

54 *Ibid.*, p.200

55 Soper argues that the heritage impulse is not to be totally rejected. It may present a bogus history but it does embody a genuine concern for the environment; *ibid.*, p.199

56 McKay, *Senseless Acts of Beauty*, p.31

has persisted through, and been exacerbated in, the CJPOA.

It may appear that we have come a long way from the previous chapter's conclusions on Rawls and the production of criminality. It is worth making the direction of the argument clear before it is taken further. The last chapter argued that Rawls' conception of the subject of liberal justice as reasonable was constructed in opposition to the subject as unreasonable, or the criminal. Therefore Rawlsian justice needs criminals. With the help of Foucault we came to understand how this production of criminality might be targetted at certain groups. The analysis of the debates on the CJPOA's becoming law in Parliament acted as confirmation of this interpretation of it as liberal law. In particular, the Act as protecting a construction of the countryside as the home of the reasonable has created the city as the place of the targetted groups or the unreasonable. This analysis is a specific applied interpretation of the general thesis about Rawls and liberal justice.

As with all applications it gains in weight when its point of application changes. Thus it is interesting to note how this discussion of the CJPOA through the city/country distinction might inform the more recent coverage of what has been widely referred to as the countryside issue, culminating in the Countryside Rally against the proposed ban on fox-hunting in Hyde Park on July 10 1997. Hugo Young's commentary on this date is particularly interesting. For Young, a good liberal, the issue is essentially one of minority rights: 'a ban on hunting is the demolition of a particular way of life to satisfy the prejudice which may be that of the majority, but destroys the freedom of a minority to do what it has done for centuries.' He continues that 'the British sensibility cannot be truthfully defined by people whose soul is urban and heart is

centrist.⁵⁷ The issue, then, is one of urban values dominating minority rural values, in what is perceived to be an illiberal way. However, this perception ignores how the identities and values of the rural and the urban are constructed through each other. There is no rural way of life that Young appeals to that is not formed through an exclusion of the urban. As has been argued the conception of the countryside that Young uses, that embodied by fox-hunting, is built precisely on the demonisation of those from the city. In practical terms this exclusion may take the form of criminalisation, as in the CJPOA.

The conclusion to this chapter will suggest other, broader applications of this general thesis. For now it is important to complete our understanding of the CJPOA.

4. Back to the hypothetical demands:

We are finally in the position to return to and understand the relation of the hypothetical demands discussed in chapter three with welfare liberalism. These demands were, it will be recalled:

- (1) the use of other people's land with their consent
- (2) the use of other people's land without their consent

Two theories of property were considered in relation to these demands: the libertarian and the welfare liberal theories. The libertarian theory, it was concluded, might accommodate demand (1) but not demand (2). Thus we might understand the libertarianism as not compatible with

⁵⁷ H.Young, 'Why the country is going to the dogs', The Guardian, 10.7.97, p.23.

the demands, or more precisely both demands of the groups targetted by the CJPOA. We could not say, however, that this conclusion allowed us to consider the CJPOA, in refusing these demands, as libertarian liberal justice. For libertarianism is apparently compatible with one of the demands.

The welfare liberal theory, on the other hand, might appear to be able to accommodate both demands. There is an even stronger case, therefore, to not consider the CJPOA as welfare liberalism liberal justice.

Now, these analyses sat in apparent contradiction of my aim, stated in the first chapter, to argue that the CJPOA instantiated liberal justice. Since libertarianism was at least obviously incompatible with one of the demands its arguments were pursued no further than chapter three, and focus directed towards welfare liberalism, though it was suggested that the subsequent arguments in regard to the latter might be applicable to the former.

The first step in showing that the CJPOA might be an example of liberal justice is to argue that it may be incompatible with the hypothetical demands. This possibility was opened up by suggesting that liberal property theory might not be able to accommodate non-instrumental relations with the land. We could say that such relations are excluded by liberal property theory. This being the case, welfare liberalism might be regarded as incompatible with both demands.

This scenario was just left as a possibility, not a substantive conclusion. What it opened up, however, was a way of conceiving the CJPOA within a broader system of exclusion within

liberal justice. It was suggested that within this broader system we might be able to understand the claim that the CJPOA, in preventing certain consensual activities taking place on land, is targetting certain groups in a way which appeared illiberal, but is in fact liberal. It is important to note what understanding this claim would mean: that liberalism's not meeting demand (1) would not necessarily be illiberal but could be liberal. Accepting this particular understanding of demand (1) in the context of the CJPOA, we can say that libertarian liberalism is not compatible with either of the demands, and that welfare liberalism is not compatible with demand (1) and possibly not compatible with demand (2). Therefore we can say that the CJPOA, in proscribing these demands, is libertarian liberal justice and probably welfare liberalism liberal justice.

Of course, it is precisely this broader system of exclusion within liberal justice and how this system is linked to the targetting of particular social groups that has been explored in the past three chapters. It has been argued that within this system of exclusion which constructs the liberal self, the targetting of certain groups is central. The conclusions in the above paragraph on the CJPOA as libertarian and welfare liberal justice therefore both stand.

They may not appear to be very rigorous conclusions. After all, it may have been suggested that libertarianism is incompatible with both demands and that the CJPOA is therefore libertarian liberal justice, but the argument for its incompatibility with demand (1) has been conducted through an analysis of the welfare liberal theory rather than the libertarian theory. Two answers are possible here: (1) my prime aim as stated was to show an incompatibility with one or other of the demands; whether the CJPOA might represent liberal justice would come out of this analysis; (2) it was suggested in chapter two that libertarians and welfare

liberals shared a similar conception of the self of liberal justice, and it is through analysis of the construction of this self in relation to Rawls that we have concluded that liberal justice may be structurally committed to the targetting of certain groups.

The conclusion on the welfare liberal theory is equally dissatisfying. It is incompatible with demand (1) and may be incompatible with demand (2), depending on the emphasis we wish to give to the non-instrumental relations with the land. Therefore it is probably liberal justice.

Again two responses may be made here: (1) at least an incompatibility has been shown; (2) the interpretation given to the interest theory of property in chapter three was very generous in allowing accommodation of demand (2); without such generosity such an accommodation may not have been possible.

Furthermore, it has not been my intention to come to firm conclusions. Rather it has been to give a certain reading of the CJPOA, and through this reading and informing this reading, a certain understanding of liberal justice. Certainly, I would not want to commit myself to the position, for example, that liberal justice would always prevent consensual use of private land.

It is just that in certain contexts they might, and that the CJPOA may provide one of these possible contexts. Bearing this hypothetical nature of the investigation in mind we may test the conclusions it comes to about liberal justice by applying them, however briefly, beyond the CJPOA.

5. The bigger picture:

The prime concern of this thesis has been to explore a certain theory of liberal justice. It has

argued that liberal justice, far from seeking stability within a plurality of forms of the good, is productive of conflict. This argument has been worked through, and supported by, a particular piece of legislation, section 5 of the Criminal Justice and Public Order Act of 1994. We have a certain reading of this legislation as liberal justice.

The position developed on liberal justice may help us in understanding other trends in criminal justice in Britain in the 1990s.⁵⁸ In the concluding section of this chapter I wish to indicate, briefly, these trends in relation to economic class and race, and how they might be understood in relation to liberal justice.

In both Britain and the US in recent years there has been a marked increase in the use of prisons as punishment. This increase embodies a changed attitude towards crime. To take the case of Britain first. The 1991 Criminal Justice Act with its move away from the use of prisons except for the more violent of crimes was a product of David Waddington's, the Home Secretary, opinion that prison was 'an expensive way of making bad people worse.'⁵⁹ The change came, David Rose suggests, with the Jamie Bulger case in 1993. At a time of increasing social dislocation this murder assumed a symbolic importance; it became the product of the 'disaffected' classes rather than the mysterious act of two young boys.⁶⁰ A rightwing backlash was released with Major talking of 'a crusade against crime.'⁶¹ This backlash reached its crescendo at the Conservative party conference of 1993 with Michael

58 At the moment of writing the Labour government's position on crime has not been fully substantiated in practice. Therefore this analysis of actual practice is limited to trends under the previous Conservative government. There does seem to be a revival of the importance of stigma as punishment. Thus the criminal, rather than hidden in prison, publicly parades his wrongdoing. Unsurprisingly, this form of punishment is more active in the US, though there are indications that New Labour approve; see P. Wilbey, 'Twisted values feed the revival of shame', *The Observer*, 13.7.97, p.25. However, it should be borne in mind that my concern is not the particularities of practice, but rather in how theory may give a certain interpretation of them.

59 Cited in D. Rose, *In the Name of the Law*, p.323

60 *Ibid.*, p.325

61 *Ibid.*; cited p.326

Howard announcing, 'We shall no longer judge the success of our system of justice by a fall in our prison population....Prison works....It ensures that we are protected from murderers, muggers and rapists - and it makes many who are tempted to commit crime think twice.'⁶²

This language of war on crime is the language of the exclusion of the criminal. Physically excluded in the prisons, they also become excluded from the norms defining reasonable behaviour within a liberal polity. And as the earlier discussion of Rawls suggested the reasonable is in need of controversial establishment. Thus we may agree with the conclusion of the report, *The Real War on Crime*, which argues, within the American context, that 'The enemy in this war is our own people. A war against the American people is a war that nobody can win. It brings hostility and division; it exhausts our resources and saps our moral strength. The goal is not to declare a war and win it, but to declare a peace and bring with it the terms for lasting reconciliation.'⁶³ What may be harder to support is the idea that this lasting reconciliation is possible within the terms of liberal justice which, it has been argued here, is in fact committed to the hostility and division that we may wish to overcome.

Certainly this war on crime through increased use of the prisons has seen an articulation of the criminal as delinquent, thus confirming the norm of the non-delinquent or the normal. A judge recently referred to several young people convicted of theft as 'modern footpads'.⁶⁴ Such a description raises the spectre of folk-devils, beyond understanding. The Observer comments that this is part of a movement towards a politics of exclusion within the criminal justice system. Similarly, and perhaps more worryingly, phrases like single-mothers and asylum

⁶² Ibid.; cited p.328. It was also during this speech that Howard introduced his proposals which formed the basis for the CJPOA.

⁶³ Cited in A.Rutherford, 'Enemy behind bars', The Guardian, 13.3.96, p.15.

⁶⁴ Cited in P.Beaumont, 'Rebirth of the 'dangerous classes'', The Observer, 11.8.96, p.14

seekers are increasingly becoming moralised; they are now scroungers, the undeserving poor.⁶⁵

Now, this designation of certain types of people as dangerous may well support Foucault's claim considered earlier, that criminal justice is a justice imposed from one class onto another. Categorised as irremediably delinquent it obviates any need to consider the social causes underlying their behaviour. If we adapt Foucault's argument to issues of race we may see how it is particularly applicable in terms of the war on drugs in the US, though the analysis may be equally applicable to Britain.

Elliot Currie suggests that there are now over 1.5 million people incarcerated in the US and that this has done nothing to reduce violent crime. As an example he quotes the case of New Orleans where the prison population today is five times higher today than in the 70s, but where one is four times more likely to be murdered today than the 70s.⁶⁶ Of particular relevance perhaps is the disparity in prison numbers along race lines. Nearly one in three young black men are under criminal justice supervision on any given day in the US. One explanation for this disproportionately high figure might be the expanded numbers of drug offenders imprisoned, an area of criminal policy where black people have been disproportionately targetted.⁶⁷ Another reason of course might be that it is precisely by targetting an area of previously tolerated illegalities, such as drugs, that one can criminalise people from a specified 'dangerous' social grouping.

It is in this way that we may understand the war on drugs as a racist war. It is also in this way

65 *Ibid.*, p.14

66 E. Currie, 'Imprisoning justice', *Criminal Justice Matters*, 25 (autumn 1996), pp.6-7

67 M. Mauer, 'Shocking disparities', *Criminal Justice Matters*, 25 (autumn 1996), p.13

that we may understand Rawlsian justice as a racist justice. Rawlsian justice depends on the production of the unreasonable, or the criminal. On its own this says nothing about how this criminality is to be produced. It was through Foucault that we came to a possible understanding as to how this criminality might be targetted. We saw this interpretation confirmed in the targetting of the groups in the CJPOA. We have also seen how the poor may be targetted. In more detail we have considered how this targetting may be racist in form.⁶⁸

Conclusion:

In a sense an end has been reached. Chapter three set up a problem for liberal justice: might it be compatible with the hypothetical demands of the groups targetted by the CJPOA? This chapter has completed an argument as to why it might not be. Through Foucault we saw how specific social groupings might be targetted as criminal or delinquent. Analysis of Commons' debates on the Act argued that this construction of the criminal happens against the creation of a particular image of Englishness as embodied in the rural order, in a way that paralleled the construction of the reasonable through the unreasonable in previous chapters. As significantly, this particular reading of the CJPOA has given us a possible understanding of liberal justice as productive of conflict, of criminality. The CJPOA provides an example of this process. The last section of this chapter has briefly indicated other possible processes.

As stressed near the end of this chapter this argument on the CJPOA is not intended to be conclusive. Nor should it be forgotten that its treatment has never been more than schematic,

⁶⁸ This is perhaps not the most obvious way in which Rawls may be accused of racism. My aim here is merely to show how a Rawlsian system of criminal justice may be racist. In broader terms it is, of course, plausible to suggest that the Rawlsian conception of the person in the original position is racist in that it embodies understanding about the person, in particular the split between the public and the private, which may not be available to some cultures.

with certain issues highlighted at the possible costs of others. Its importance lies rather in what it might tell us about liberal justice in a bigger sense.

The next, and final, chapter continues this search for understanding through the process of interaction between the practical and the theoretical. Its direction though is rather different. It begins, very tentatively, the search for ways of thinking that might help us avoid conflicts like the CJPOA. It makes no claim to offer solutions, but merely possible, different ways of seeing.

Chapter Seven: Towards Public Spaces

Introduction:

This work has offered a particular way of seeing the CJPOA, and through this argument and informing on it, a particular understanding of liberal justice. Essentially it has suggested that some such legislation as the CJPOA may be necessary to liberal justice. The CJPOA has been interpreted along lines that support and consolidate this theoretical position. A certain critique of liberal justice is the result, a critique which argues essentially that exclusions of certain social groupings are central to the construction of the liberal self.

This critique has, admittedly, been largely destructive in its attempt to articulate the basis of at least some conflict in liberal societies. This chapter explores the possibility of working beyond these conflicts. As noted at the end of the last chapter, its intention is not to come up with answers, though it is presumptuous enough to offer one or two suggestions. Rather it aims to indicate some of the complexities that need to be addressed if we are to construct a theoretical framework that might properly accommodate differing forms of life. Indication of these complexities may also inform and deepen our foregoing analysis of liberal justice.

In these senses this chapter does set off in a different direction. It is also to be distinguished from previous chapters in its scope. It does cover a large amount of theoretical ground meaning that its arguments are broad and, more often than occasionally perhaps, partial. On the other hand, the material it deals with is familiar. Instrumentality, the self, the land, property, the CJPOA, the country and the city all come up again. It is by looking at them from

different angles that we might be able to suggest ways beyond the liberal production of conflict.

Now, there may be various ways of approaching this problem. The approach taken here is situated within the discussion that has so far taken place on the CJPOA and liberal justice. It aims, however, to consider the other side of this discussion; that is, it attempts to suggest an understanding of those who are excluded by liberal justice, and in particular by the CJPOA. The only understanding of these excluded we have so far is how they have been constructed through their exclusion. It is by giving a different articulation to their position that we might be able to see how they can co-exist with other forms of life.¹

The roots of their exclusion, as we saw, lie deep in liberal theory. They form part of the construction of the self of liberal justice, and are targetted as part of this process. We also noted in chapter three how they may be excluded by the liberal property relation, the instrumental nature of which might not be able to accommodate non-instrumental attachments to the land. This exclusion has not been a central part of the argument so far in this work; it has largely served as a way of opening up for discussion the possible non-compatibility of the hypothetical demands and welfare liberalism. However, their exclusion by liberal property theory would also be part of their creation as unreasonable, as beyond the liberal. It is through exploring this exclusion here, or through exploring that which is excluded, that we can come to some understanding of the position of the excluded groups.

¹ As with the hypothetical demands of the targetted groups earlier, the presentation of the position of those excluded by the Act here is not meant to be accurate in any empirical sense. It is a hypothetical position which allows us to work through various theoretical problems that arise from it.

Section (1) of this chapter looks at the instrumentality which, in the liberal property relation, might exclude other claims. It is considered particularly in relation to the land and property in land. It is suggested, through a reconsideration of the CJPOA, that the instrumental may sometimes appear as the non-instrumental. With this possible danger in mind section (2) considers non-instrumental relations with the land in contrast to the separated identity of the liberal self.²

The notion of identity, which has informed much of our discussion of liberal justice, therefore becomes explicit in this chapter. It is important, at the outset, so as to avoid any subsequent confusion, to specify the type of identity in relation to the land that will be explored. In a far from exhaustive list one may note: (1) the identification of an individual with a specific piece of land; (2) the identification of a group with land in general, i.e. not any specific piece of land; (3) the identification of a group with a specific piece of land. It is the last that I consider in this chapter, though (1) and (2) may be referred to in passing. The reasons for this choice are that in part I am trying to remain within the structure so far followed in this work, that of situating theoretical discussion within the context of the CJPOA. I hypothesise, and it is no more than this, the groups targetted by the CJPOA as seeking some sort of identity with the land as particular as a group. Secondly, and allied to this reason, is the greater political interest of the identification of a group with a specific piece of land. It is here, as explored briefly later, that the problems of nationalism and communitarianism, for example, lie. Identification with the land at its most general, though maybe an important spiritual and environmental experience, is

² V.Plumwood, 'Nature, self and gender: feminism, environment philosophy, and the critique of rationalism', *The Environmental Ethics and Policy Book*, ed. D.VanDeVeer and C.Pierce (Belmont, Wadsworth, 1994), offers a useful parallel to the course of argument taken in this chapter. She argues essentially that the instrumental self is a separated self which is part of a system of dualisms which devalues other ways of relating more closely to nature. In a sense this is the point reached at the end of the third chapter. Her exploration of a self-in-relationship with nature provides an alternative to a self which is opposed to and dominant of the natural. It thus provides an understanding of the self which can avoid the conflict and exploitation that the instrumental self with its related set of dualisms produces.

not a common part of political reality. Individual identification with the land as specific may quite simply not be important enough to raise political interest.

This discussion of identity exists within a larger framework than it is possible, in the limited space available, to do justice to here. In consequence the argument is again structured in large part through discussion of property theory and the CJPOA. However, in brief, or so it could be argued, modernity's search for the universal along with increasing globalisation and the impact of information technology has led to a loss of community and tradition. The impact of technology on an ever-changing environment has dislocated our attachment to place. The 'old allegiances of place and community'³ are undermined along with the ways we might define ourselves through them; thus the subject of liberal justice as stripped of all characteristics of the particular. This non-attachment to place has led, some argue,⁴ to a sense of homelessness and a consequent longing for home. This longing produces the communitarian and postmodern emphasis on attachments to the particular.

It is within this transition from the universal abstract identity to the particular and concrete identity that my argument moves. Of course, merely articulating what has been hidden, in this case a closer identity with the land, does very little on its own to prevent conflict; it may in fact increase it as the clamour of voices demanding justice in the public realm grows stronger. I argue furthermore that such an identity is as dependent on opposition as the liberal self. The longing for home is not, as Robbins and Morley note, an 'innocent utopia'; it is dependent on the exclusion of others.⁵ Thus the final move in section (3) towards the idea of public space, a

³ Introduction, Space and Place: Theories of Identity and Location, ed. E.Carter, J.Donald and J.Squires (London, Lawrence and Wishart, 1993), p.ix

⁴ See for example, D.Morley and K.Robins, 'No place like *Heimat*: images of home(land) in European culture', Space and Place: Theories of Identity and Location, ed. E.Carter, J.Donald, J.Squires, (London, Lawrence and Wishart, 1993), p.4

⁵ *Ibid.*, p.8

space in which a more fluid and non-exclusive notion of identity may be possible. This idea may be interpreted in two ways: one which raises problems similar to the liberal account of the public or the political; the second, more limited, allows us to address the liberal theory of private property through which the argument on the CJPOA has been mediated.

1. Instrumental relationships

1.1 Instrumentality and the land:

First to instrumentality and the instrumental self's identity as separated from the land. In particular I explore here the instrumentality of the liberal property relation. I suggest that property may be seen as a form of control over 'nature', or that which is appropriated, and consider the CJPOA within this context. However, and to take the argument from the last chapter on the countryside further, I propose that this instrumental control over nature is obscured by an apparently non-instrumental identification with the land. This possibility takes us onto the next section in which the dangers of certain proposed closer identifications with the land are considered.

Put very simply, an instrumental relationship exists when O is valued only as a means towards serving the ends of P. O here is instrumental to P. The instrumental nature of their relationship affects both of them. O is devalued except insofar as it serves the ends of P; P separates itself from O in this process of devaluation.⁶

⁶ The point could be expressed in a more sophisticated way, though it remains essentially the same for present purposes. Adorno articulates two aspects to an instrumental rationality: one, its attempt to homogenise the particular. Two, the way in which this objectification of the particular separates us from it. The first we see happening in both science and capitalism. The particular objects of nature, be they for scientific research or capitalist exchange, are objectified under the dominant value system of that rationality. They lose their particularity and become merely a class under that system. The second aspect

How this instrumentality, particularly in the instrumental rationalities of science and capitalism, has contributed towards a conception of the self as separated from and dominant over nature hardly needs elaboration. Even accepting the anti-realist stance that there are no truths as such to be found, scientific reasoning still seems to be premised on the search for prediction and therefore control over the natural. Prediction takes the form of general laws; under these laws the particularity of the natural is lost. Nature merely becomes an object to be investigated for human purposes; it has no value in itself. People become separated from it, observers and researchers of the objects of nature. And along with this instrumental manipulation of nature grows an instrumental manipulation of other people. Thus domination is in fact increased.⁷

Capitalism, in the economic sphere, again reveals this kind of reason at work. For the free exchange of goods, some commensurability of value needs to be imposed, and through the imposition of this external value a homogenisation occurs in which the particular is lost under the universal. Again what is lost is the sense that things can be valuable in themselves; instead they become merely functioning parts of the production of capital. Valuable only insofar as they can be exchanged, they become objects separated from the human subject.⁸

In the more particular terms of our relationship with the land, landscape painting might be

follows inevitably from this homogenisation. Because the things of the world lose their particularity they lose their value as particularities. Their value now resides in the part they play in the system they serve. In effect they become objects for subjects of these systems, people, to work on. Thus the great divide between subject and object is created. For an introduction to these ideas see J. Bernstein's introduction to T. Adorno's *The Culture Industry: Selected Essays on Mass Culture*, (London/New York, Routledge, 1991), and 'The world spirit on the fins of a rocket: Adorno's critique of Progress', M. Lowry and E. Varikas, *Radical Philosophy*, 70, (March/April 1995).

7 See for example M. Bookchin, *The Philosophy of Social Ecology*, (Montreal/New York, Black Rose Books, 1990), for an exploration of the links between domination of nature and domination within societies. It is the emphasis on these links that is distinctive of social ecology in current environmental philosophy.

8 See A. Collier 'Value, rationality and the environment', *Radical Philosophy*, 66 (spring 1994), for an outline of this homogenisation of goods under capitalism in relation to Marx's distinction between use-value and exchange-value.

seen to embody this process in a specific area. It attempts to represent land as it actually is. In Thomas' words it 'freezes place as seen from a particular point of view'.⁹ By objectifying land it places the viewer outside the picture; the distance between subject and object is thus confirmed. 'Landscape painting is thus a representation of place which alienates land.'¹⁰ Previous (and subsequent) artistic impressions of land blur the distinction between the subject and object. By not trying to capture the outward appearance they convey an experience of the land, one that can't simply be conveyed in geometrically defined relationships.¹¹

These changes in artistic depiction of the land were of course part of a wider movement of change in social relations with the land. This was the move from the complex feudal system in which land was not regarded as a commodity to be bought and sold on the market; rather its possession involved a complicated series of obligations. The advent of capitalism destroyed this hierarchical system and made land an object with exchange value.¹² From a greater historical perspective it represents an attempt to tame the land, to make it purely a function of the human. In the Bible Jesus' trip into the wilderness is seen as a dangerous trip; the wilderness is the home of the devil. Capitalism and science sought to dispel this threat of the land as wild and dangerous. They tamed the land. Once tamed it is regarded as a benign resource, as we see in Locke. In contrast, for nomadic peoples and New Age Travellers the

⁹ J.Thomas, 'The politics of vision', *Landscape: Politics and Perspectives*, ed. B.Bender, (Providence/Oxford, Berg, 1993), p.21.

¹⁰ *Ibid.*, p.22. In addition, as Soper, *What is Nature?*, pp.234-236, rightly points out, we should not ignore the class dimension in any representation of landscape. Firstly, this representation is more often than not the expression of a minority, class taste. Secondly, the landscape as alienated from the painter often contains images of the peasantry as happy and unalienated. Thus the painter, and his patron, do not have to confront the social consequences of their dominion over 'nature' of which this form of painting is a part.

¹¹ These remarks should not be taken too seriously, in that they might be better expressed with appropriate qualifications. Of course, not all landscape painters try to capture the land as it is, Turner providing just one particularly well-known example. My point though is to show how an instrumentality might manifest itself in our relations with the land, and to this extent the truth that this perspective on landscape painting contains serves me well.

¹² K.Olwig, 'Sexual cosmology: nation and landscape at the conceptual interstices of nature and culture, or, what does landscape really mean?', *Landscape: Politics and Perspectives*, ed. B.Bender, (Providence/Oxford, Berg, 1993), p.331, comments on this subject: 'Landscape was framed and reified as a cultural object, to be bought and sold as cultural capital on the burgeoning new art market, much as land itself was being divided up according to the geometric coordinates of the map, to be sold and traded on the property market'.

land is not seen as 'other', either as something to be feared or to be tamed; it is merely something to live with.¹³ Again landscape painting also developed as modern science was born. It embodies the same perception of the world as science- that its reality is simply empirical, particularly visually empirical, reality, and that this reality can be framed, distanced and thus controlled by human subjects.

Private property, insofar as it mediates our attachment to place, is central in this attempt to control. Furthermore, it is instrumental in two different ways. Property is a relation between people over things, in which X has certain rights over Y as regards Z.¹⁴ Now it is X who is clearly the subject of this relation. Z is the object, strictly speaking, of these rights; she owes certain duties to X in regard of these rights. It is here that the property relation inheres. The extent to which this may instrumentalise our relations with each other should not be underestimated. However, it is X's relation with Y that is of more importance here, since it specifies the conception of self that may be included or excluded by the liberal theory of property. This *may* be an instrumental relation in which Y serves the ends of X. It has certainly been an instrumental relation in the theories of property that have been considered so far, in which Y serves the interests or negative freedom of X.¹⁵ As such it involves and

13 See J.R.Des Jardins, Environmental Ethics, (Belmont, Wadsworth, 1993), pp.169-171, for a discussion of changing conceptions of land as wilderness. Soper, What is Nature?, pp.221-232, argues that the appreciation of the sublime in nature, as part of the Romantic movement, was only possible when control over nature had been asserted. Wilderness as an aesthetic is dependent on our own feeling of security as against this wildness.

14 Of course X and Z here need not refer to individual persons since collectives may also hold and bear the duties of property rights. Nor need Y refer exclusively to material things - much of our property is in fact non-material, such as shares and intellectual copyrights. A.Ryan, Property and Political Theory, pp.5-13, makes a distinction between two traditions connecting work and property: the instrumental and the self-developmental. Whilst acknowledging the difference between Locke's theory, which certainly has a large instrumental aspect, and that of Hegel, where the relation between X and Y is intrinsically significant as part of one's ethical development, the use of instrumental in my argument is rather wider-reaching than in that of Ryan's. As I suggest later, Hegel's theory of private property can be read as instrumental.

15 The caution here is deliberate. Marx would hold that private property necessarily instrumentalises that in which it is held. In his discussion on the law dealing with the theft of wood, he argues that the wood stolen is misconceived if it just seen as a dead object, with our relations to it as owners and non-owners structured through the property relationship. Conceived as such we miss the extent to which the wood is part of a social and economic context; private property makes us define ourselves in relation to separated objects, thus preventing us from seeing how the wood is humanised, or processed through the subject. See K.Marx, The Economic and Philosophic Manuscripts of 1844, ed. D.Struik, (New York, International Publishers, 1964), and A.Schmidt, The Concept of Nature in Marx, trans. B.Fowles (London, NCB, 1971), chs.2 and 4.

produces a certain conception of self or subject as separated from nature or object.

This instrumental nature of the private property relationship is set against other possible conceptions of the relationship and of the self. In our discussion of the CJPOA we saw how these alternative conceptions may be excluded by liberal property theory. I come to an articulation of these alternatives in the next section. First, however, we need to explore what might appear to be a diversion, though it does in fact raise important questions about closer, non-instrumental relations with the land. That is, how private property may be supported in ways that do not strike one immediately as instrumental, a process we may see happening in the CJPOA.

1.2 The CJPOA and the disintegration of property:

Fitzpatrick, it was discussed earlier, sees the creation of natural others in imperialism as an essential part of the liberal project. He argues further that this process was not confined to imperialism but was, and is, integral to the operation of liberal law at home as well. Property mediates the relationship between humanity and nature, just as liberal law as a whole mediates the relationship between the imperialists and the imperialised. Equally though there is an alternative site of power to the liberal one, in this case the fact that property' retains an apartness, a quality of nature, an essential alterity, not just as reified object but as the motor-force of the natural development of humanity.¹⁶ To return to the two ways in which the natural

However, there may be arguments which show the possibility of non-instrumental private property. In particular it seems possible to suggest that Y in the property relation, or land in this particular instance, is not instrumentalised by the relation; rather its instrumentality or otherwise depends on how we conceive of it outside of this relation. Since Marx clearly regards the land or the natural as a resource outside of the property relation he cannot properly argue that private property necessarily instrumentalises the land. Thus non-instrumental property may be possible. I consider this possibility in more detail later in the chapter.

16 Fitzpatrick, 'The desperate vacuum': imperialism and the law in the experience of Enlightenment', p.95. V.G.Kiernan, 'Private

is constituted by liberal law. Here property is opposed to the natural as the expression of a rational will, but this will also actively constitutes what is natural by its opposition. Thus its appropriation of nature is not the appropriation of a nature that really exists but is one that it has actually created and against which it sets itself. It provides the 'monsters' of nature which define the civilised.

This line of argument follows the same model as that when considering the construction of the self of liberal justice. Taken a little further we might come to an understanding of the fragility of the identity of this self as separated and, how the CJPOA might be interpreted as a reaction to this fragility.

In order to understand this possibility we need to return to an issue explored in chapter three - that property is not actually things but rights held over things. Thus to have property in Y is not to have Y but to have a set of rights over Y which other people have a duty to respect. As indicated in the third chapter, Honore identifies eleven incidents or rights found in the full liberal conception of property. These incidents include most importantly the rights to possess, to use, to manage, to the income, to the capital, to security. It is easy enough to think of examples when not all these rights are held together by one person. Thus the owner of a house has the right to manage his house, but not the rights to use and possess it once she has contracted these rights away for a specified period of time. So not all these rights need to be held for property to be had in some thing. In fact, as the house example shows, it is quite possible for two or more people to have property in the same thing at the same time.

property in history', *Family and Inheritance: Rural Society in Western Europe, 1200-1800*, ed.J.Goody, J.Thirsk, E.P.Thompson, (Cambridge, Cambridge University Press, 1976), p.366, suggests that the growth of private property 'may represent a gradual individuation of the energy of humanity's collective struggle against nature'. The argument put forward here suggests that the situation was in fact more complex.

Now this possibility of splitting the property rights bundle has led some theorists to question the notion of ownership as the cohering idea behind talk of property. In particular Thomas Grey has argued that there is no core right which can be found in all cases of professed ownership. So property rights aren't rights of ownership.¹⁷ Grey goes further to suggest that, since property rights do not seem to be distinctive by virtue of being rights in things (since most property in capitalist economies at least is intangible),¹⁸ then there seems to be nothing to distinguish property rights from other legal rights and property is a redundant political and legal category.¹⁹

We don't need to agree with Grey's conclusions to note the significance of this disaggregation of property rights for the previous talk about property and nature.²⁰ For the important point here is that once it becomes clear that property is rights and not things, that which property is held in, or nature, becomes a much more obvious resistant site of power. We don't have these things in any real sense; all we do have are rights over them. Stronger as a resistant category, it now becomes more imperative to assert its otherness as nature.²¹

The recent history of property rights, albeit only one story, confirms this argument. Feudalism had developed after the Norman invasion as a way of guaranteeing loyalty to the Crown. A complex system of tenures grew up, essentially the holding of land in return for certain services.²² The whole system was a complex structure of rights and duties in relation to the

17 T.Grey, 'The disintegration of property', *Property*, (NOMOS 22), ed. J.Chapman and J.Pennock, (New York, New York University Press, 1980), p.70.

18 *Ibid.*, p.70

19 *Ibid.*, p.73

20 For different conclusions on how this disaggregation of property rights affects our conception of ownership see ch.3, section 3.1.

21 Kiernan, 'Private Property in History', p.374, notes how land has always defied people's attempts to engross it as their own.

22 See A.Simpson, *A History of the Land Law*, (Oxford, Clarendon Press, 1986), ch.1, for all the kinds of tenure that existed. A knight might hold land off the king in return for military service; a farmer might hold land off the knight in return for food; a peasant might hold land off the farmer in return for labour.

land. Property, up till the seventeenth century so Macpherson argues, was quite clearly a matter of rights or titles and not the thing itself.²³ At the same time it resulted in a lack of economic freedom with the individual unable to freely transfer land because of this complex network of rights and duties that existed over it. The advent of capitalist relations meant a gathering of all the property rights in one individual, who now could do what she wanted with her 'property'. And as Grey suggests this 'rebundling' of property created a tendency to see property as things. In consequence in the eighteenth century property 'stood at the centre of the conceptual scheme of lawyers and political theorists.'²⁴

Post-war Britain, meanwhile, has seen a reversal of this trend. Today, intangibles such as stocks and shares dominate the property markets rather than physical things which might be owned. Grey argues further that this splitting of property rights is an inevitable feature of a developed free market economy in which 'Proprietors subdivide and recombine the bundles of rights that make up their original ownership, creating by private agreement the complex of elaborate and abstract economic institutions and claims characteristic of industrial capitalism.'²⁵ The growth of the welfare state and rising environmental awareness have also led to increasing collective inroads on private property rights.²⁶

So there has been an increasing tendency for property to be seen as rights. Neither is it surprising perhaps that this attempt in the case of the CJPOA to exclude the natural through property has taken place in terms of property in land. For it is land which seems to most strongly resist property rights, the attempt to make it the same thing as property. With

²³ Macpherson, 'The meaning of property', p.7

²⁴ Grey, 'The disintegration of property', p.73

²⁵ Ibid., p.75

²⁶ Harris, *An Introduction to Law*, p.112. Harris comments that the saying 'An Englishman's home is his castle' is no longer applicable today.

personal goods the property rights bundle is more likely to remain as a full set; there is not then the gap to disillusion us of the idea that we own things rather than only enjoy rights. It is important, to return to the example given in the third chapter, that the person who has the right to use an apple also has the right to consume it. Property in land does not so easily lend itself to what Donahue calls this agglomerative tendency.²⁷ The fact of its permanence, it was noted in chapter three means that it lends itself 'to the creation of a diversity of concurrent and consecutive interests.'²⁸ That, in theory, all land is held off the Crown merely emphasises that what we have are rights in land and not the land itself.²⁹

Of course in ordinary political terms these points about the nature of property might not hold great significance, or interest. However, perhaps there is anxiety at the increase in planning and environmental constraints on property, at greater public access to land, at increased tax burdens on property. In all these respects, the fact that we only have rights and not the thing in itself is emphasised, and the frightening otherness of the uncontrollable thing in itself is reinforced.

To come back to our practical focus, the CJPOA. The real significance of this gap in control in relation to the CJPOA is that this Act is not, as has been constantly argued, a simple strengthening of private property rights. So, the argument is more sophisticated than the CJPOA simply being a response to the disintegration of property. Rather it is a response which strengthens only certain property rights. To do so it needs to create an enemy which justifies

27 C. Donahue Jr., 'The future of the concept of property predicted from its past,' *Property* (NOMOS 22), ed. J. Chapman and J. Pennock, (New York, New York University Press, 1980), p.32.

28 Henderson, *Land Law*, p. 1. These interests may include public rights of way, easements, planning restrictions, tenants rights.

29 This apparently strange situation has its roots in the aftermath of the Norman invasion when, as a way of guaranteeing loyalty from his knights, the king gave them tenures in land in return for certain services. See Simpson, *A History of the Land Law*, pp.3-4

this selective strengthening. Central to this creation, it was argued, was an image of England, embodied in its countryside, as a place of law and order. Through this image the urban is created as different, as the possible habitat of the criminal. It is an image in which identity is, at least partially, constituted through some, possibly imagined, attachment to the land.

This argument has moved, apparently, to a much closer conception of the relationship with the land. Here the land is not a mere resource to be exploited but something through which we might define who we are. A non-instrumental identity with the land is the outcome of an argument that aimed to show how the instrumentalism of liberal property excluded non-instrumental claims.

2. A non-instrumental conception of the self:

It is important, clearly, to be mindful in how we conceive of our proposed identification with the land. This section explores some of the dangers in the articulation of this conception. That exclusion is inherent in this attachment to place through the land results in the final section's search for non-exclusive identities.

2.1 An ecological identity:

First though let's give a possible account of what this closer relationship to the land might be. Environmental philosophy, as addressing our identity with and ethical concerns for the non-human environment, might be turned to as offering a sense of this relationship for the groups targeted by the CJPOA. I argue that although this relationship may hold some conviction

when taken in relation to the environment as a whole, when taken in relation to those bits of the environment in which we must all live, familiar problems arise, problems of partiality and exclusion.³⁰

We can get some way toward the kind of relation we are looking for by considering briefly the claims of deep ecology on identity. Deep ecology, notwithstanding its diverse strands, is essentially an ontological rather than ethical philosophy. One of what Devall and Sessions call its 'ultimate norms'³¹ is that of self-realisation. The process towards such realisation involves an identification with the world beyond the narrow or isolated self which we have encountered in discussion of previous private property justifications. However, it is not entirely clear what this process of identification is, and perhaps it never can be, theoretically at least. Devall and Sessions suggest that the ideas of deep ecology 'cannot be fully grasped intellectually but are ultimately experiential'.³²

Nevertheless it is possible to get something out of deep ecology's notion of identification. To take one example: Arne Naess suggests that the 'ecological self of a person is that with which this person identifies'.³³ Now, this could be taken to be merely an extension of self-interest, that what happens to the environment matters to me because I am that thing affected. There are difficulties here, as Val Plumwood notes, since it seems problematic to propose a critique

30 Note the distinction between the different forms of identification made in the introduction to this chapter.

31 B.Devall and G.Sessions, 'Deep ecology', The Environmental Ethics and Policy Book, ed. D.VanDeVeer and C.Pierce (Belmont, Wadsworth, 1994) p.216

32 Devall and Sessions, 'Deep ecology', p.218. It is perhaps significant that deep ecology appeals to eastern philosophies as providing grounds for this closer identification with nature. R.Guha, 'Radical American environmentalism and wilderness preservation: a third world critique', The Environmental Ethics and Policy Book, ed. D.VanDeVeer and C.Pierce, (Belmont, Wordsworth, 1994), pp.551-552, argues that this perception of the east does 'considerable violence to the historical record. Throughout most recorded history the characteristic form of human activity in the "East" has been a finely tuned but nonetheless conscious and dynamic manipulation of nature.' In this process the east is consolidated as the other, the place of the non-rational.

33 A.Naess, 'Self-realisation: an ecological approach to being in the world', The Environmental Ethics and Policy Book, ed. D.VanDeVeer and C.Pierce, (Belmont, Wadsworth, 1994), p.223

of the narrow self on the basis of merely expanding what governs that self, self-interest.³⁴

However, the point being made might be a more radical one, that the self, through this process of identification, becomes continuous with that with which it identifies.

Deep ecology has been rightly criticised about this identification. In its haste to exceed the narrow, separated self it buries it in the whole which, as Bookchin suggests, leaves it open to social control and manipulation. With the myth of the good of the whole dominant there is no point from which resistance is possible. Nazi Germany provides an example of such a process at work, with its myth of a group attachment to land, through its appeals to earth, blood and folk, that was fundamental to the identity of the German people.³⁵ Equal to these dangers is how such a proposal of indistinguishable wholeness seems to mistake its target. The separation of self from nature is not the result of differentiation per se, which there are great difficulties in denying and great dangers in not denying,³⁶ but rather of a particular dualism inherent in the instrumental relation of control between people and nature. Since this relation is part of a particular political and economic programme it needs to be considered and overcome within this context.³⁷

Soper sees the greatest significance of deep ecology as lying in its limitations. The propositions of deep ecology are 'useful not because we can observe them, but because they cause us to reflect on how we cannot, or why we do not want to.'³⁸ Following from such

34 V.Plumwood, 'Nature, self and gender: feminism, environmental philosophy, and the critique of rationalism', p.258.

35 Bookchin, *The Philosophy of Social Ecology*, p.10

36 Without some distinction there would be no reason to value humans more highly than microbes and viruses which seems, on the face of it, a counter-intuitive position. Accusations of eco-fascism seem justified in this respect. Des Jardins, *Environmental Ethics*, p.166, does point out that deep ecology is really an ethics of character. It asks what kind of person you should be. As such claims of eco-fascism seem harder to uphold.

37 For a critique of deep ecology in this context see, for example, Plumwood, 'Nature, self and gender: feminism, environmental philosophy, and the critique of rationalism', pp.256-259

38 Soper, *What is Nature?*, p.258

reflections, there are accounts of our relationship with the land that seek to preserve the differences that deep ecology denies whilst drawing connections between the self and its environment that break down their separation. For example, Plumwood suggests that the relationships between people and between people and things are not merely accidental, happenings that contingently attach themselves to our central selves, but are in fact constitutive of our selves.³⁹ The social ecologist Murray Bookchin distinguishes between first and second nature, between the nature of the non-human world and the nature of consciousness and its institutions, which are, however, united through being part of the same developmental reality.⁴⁰ Soper suggests how full identification with the land is beyond us. She argues for a greater experience of regret at this separation. It is in this sense that we would, paradoxically maybe, get closer to 'nature'.⁴¹

I do not intend to give a fuller account of what this identification might be. Certainly the examples above might offer the possibility of a relationship with the land or nature that is non-exclusive, without falling into the problems of an indistinguishable whole. As such they may form an important part of an environmental consciousness. However, this relationship might only remain non-exclusive if land or nature is being used in its most general sense. It is non-exclusive precisely because the identity is with everything.

The possibility of this identification with the land at its most abstract, as a whole, is not something I explore further here. It fails to get a grip on the specific attachments that people may have to specific places. As noted in the introduction to this chapter, it is these kinds of

³⁹ Plumwood, 'Nature, self and gender: feminism, environmental philosophy, and the critique of rationalism', p.262

⁴⁰ Bookchin, *The Philosophy of Social Ecology*, pp.42-45 and 162-87, argues that his theory of the relationship between humans and the rest of nature avoids both dualism and a reductive monism. His account of difference, with humans as responsible for the rest of nature, has led to accusations of anthropocentrism. See Des Jardins, *Environmental Ethics*, p.247.

⁴¹ Soper, *What is Nature?*, p.278

attachments that are central in articulating the possible relations with the land of the groups targetted by the CJPOA.

2.2 The dangers of identification:

We have then an outline of how groups might identify with specific pieces of land. There are, however, dangers with this identification. At the end of the last section we noted the apparent contradiction between the instrumentalism of liberal property theory and the non-instrumentalism of certain arguments used to strengthen claims from this theory. This contradiction need not unduly alarm us. It would be relatively easy to show how this image of Englishness is merely a piece of political nostalgia, and myth-making, that serves to obscure the real economic, and instrumental, interests that are at work in exploiting the land. Keeping the groups targetted by the CJPOA off the land is of course part of this process. It is an image, as Soper notes, in which alienation from the land is denied, thereby obscuring the economic and social realities which pervaded, or continue to pervade, that existence.⁴² Therefore we need to be careful in articulating this non-instrumental relationship with the land (an articulation that may represent the groups targetted by the CJPOA), that we don't, unwittingly perhaps, conspire in the creation of that image which in fact is central to the substantiation of the instrumental.

The point may, at the risk of conjecture, be taken further. Chambers notes an ambiguity in the British, and more specifically English attitude towards modernism. He argues that, until recently, Britishness has been defined around certain institutions of our public life - Oxbridge,

⁴² Ibid., p.192

the monarchy, Westminster - which represent a very partial image of what it means to live in Britain. Britishness 'invariably stands in for the quiet authority and organic continuity of an English conservatism' with the consequence that its culture apparently exists 'beyond the mechanical rhythms and commercial logic of industrial society and the modern world.'⁴³ The last twenty years has seen a change of emphasis; the stress on the free-market, on the freedom of the individual, is a challenge to these institutions, and the Britishness they embody. Chambers suggests that this notion is now up for grabs.⁴⁴ The CJPOA might be interpreted as part of an attempt to reassert this prior sense of Britishness, through its re-evocation of a partially constructed countryside.

On a broader scale, beyond the particularities of the country/city divide, these are problems of nationalism. The nation is, at least in part, defined by a shared attachment to the land, and individuals, at least in part again, defined by their identification with the nation.⁴⁵ Often, as Miller notes, this shared attachment to the land is a myth created to bind together apparently diverse groups into a nation.⁴⁶ Here, I merely note two problems with this national identification with the land. (1) It is likely to exacerbate conflict rather than ease it. The infamous history of nationalism might provide many examples, though the problem is essentially a simple one. Land is limited. More than one nation may make a claim to the same piece of land, and since the claims are made on the basis of an identification with the land which provides its own justification, there is no room for shared understandings which might

43 I. Chambers, 'Narratives of nationalism: being 'British'', *Space and Place: Theories of Identity and Location*, ed. E. Carter, J. Donald, J. Squires, (London, Lawrence and Wishart, 1993), pp.146-7

44 *Ibid.*, p.157

45 A shared land-base is regarded as one of the objective criteria, at least one of which a people must have, if they are to have the shared culture which constitutes a nation. On their own, however, these objective criteria are not enough; there must also be a consciousness of being a member of a nation. For an introduction to the complexities involved in these definitions see E. Gellner, *Nations and Nationalism*, (Oxford, Blackwell, 1983), chs.1 and 5.

46 D. Miller, 'The Ethical Significance of Nationality', *Ethics*, 98 (1988) p.648; B. Anderson, *Imagined Communities*, (London, Verso, 1983), explores at length the nation as an imagined community.

enable a solution to the conflict. (2) In this creation of a shared attachment to land there may well be some groups placed on the outside, not of the nation. We saw this in the creation of an Englishness based around a certain version of the countryside. More fundamentally, to regard the nation as a unit of value, is to set oneself against other nations, or those not part of the nation. National identity is, as Anderson argues, built upon a sense of the limitedness of the nation.⁴⁷

We may note two important features in both the notion of Englishness built around the countryside and in nationalism more generally: (1) that they are identities which exclude; (2) that the community through which identity is structured may be an imagined one, defined precisely against those it has managed to exclude. This second point needs more investigation since it is this construction of identity based on exclusion that we want to avoid.

The communitarian attacks on the liberal self, famously called unencumbered by Sandel,⁴⁸ are interesting in this context insofar as their mistakes reveal possible problems with this creation of community. Essentially, the communitarian self is 'situated' as opposed to the liberal self which is unencumbered. The liberal self is defined by its capacity to rationally choose and pursue ends whereas the communitarian self is at least partially defined by ends from which it cannot be separated; its definition is not solely as a rational chooser of ends, since some of these ends are part of the self itself.⁴⁹

47 Anderson, *Imagined Communities*, p.16

48 M.Sandel, 'The Procedural Republic and the Unencumbered Self'

49 The communitarian position is of course much more diverse than this brief summary would suggest. For an indication of this variety see W.Kymlicka, *Liberalism, Community and Culture*, ch.4; S.Caney, 'Liberalism and communitarianism: a misconceived debate', argues that the differences between liberals and communitarians are not in fact very significant. Certainly, Rawls' later philosophy, with its explicit recognition of ideas implicit in liberal political culture, seems to mark a move towards a communitarian form of liberalism.

On the issue of the self in the original position Rawls has attempted to clarify his position in the face of criticisms from Sandel and others, saying that he wasn't making a metaphysical point about humans at all, but only a point about them as citizens. His aim is not to give us a comprehensive morality but only to give principles to govern the basic political structure of society. There are problems, as we saw in our discussion of the reasonable, with this split between the comprehensive and the political,⁵⁰ but essentially Rawls' clarification seems to have taken the force out of Sandel's objection to his unencumbered self, and other related communitarian objections.

Let's accept this conclusion, that basically Sandel mistook his target. It seems then that we are no further on than before looking at the communitarian attack on the liberal self. However, it is the nature of the mis-taking that is itself interesting here, and can lead us forward. Sandel's critique leaves untouched the public self, conceived as rational and reasonable, and it is this self which, it was argued, lay at the bottom of conflict in liberal legalities. It is left untouched because Sandel wants to talk about the 'real' self which is situated rather than unencumbered. He wants to make an ontological point whereas Rawls is making a political one. So the mistake is to suggest that the problem is one about real selves. Not only does this mean that Sandel fails to get a grip on Rawls' argument as it stands but it also results in him missing seeing how the self might be constructed, both his communitarian self and more importantly the liberal self. For certainly it seems that the situated self is hardly likely to be uncomplicated; as Bauman comments, 'Far from being a 'natural given', 'situatedness' is socially, and *controversially*, produced; it is always an outcome of competitive struggle, and- more often

50 The reasonable is an expression of the commitment to this split, a commitment that is itself controversial. As Mulhall and Swift, *Liberals and Communitarians*, p.178, comment, someone with a comprehensive morality who did not accept this split would be forced to hold their comprehensive view 'in a rather less than whole-hearted, one might say even a rather liberal, way.'

than not- of individual choice.⁵¹ The self is constructed; seen as such more than one kind of self can begin to co-exist. Bauman also comments on the community that is somehow supposed to define our ends in the communitarian theory that it is merely 'a fluid collection of men and women acting at cross-purposes, fraught with inner controversy and conspicuously short of the means to arbitrate between conflicting ethical propositions. The moral community proves to be not so much *imagined* as *postulated*, and postulated *contentiously*.⁵² The communitarian in fact creates the community in which its self is situated.

This postulation, as we have seen in our discussion of the particular construction of Englishness, takes place against a background of limits, of those who are outside these limits. We may also find such a process of construction and exclusion if we turn to a particular reading of the city. Robins notes how a certain postmodern re-enchantment of the city, with its emphasis on the local and the particular in contrast to the abstraction of the modern city, is too often in reality a new form of romanticism which creates 'a cosy and cleaned-up version of city life, one which avoids the real conflicts and stresses of urban life.'⁵³ Recall the romantic idealisation of the rural which serves to support the exclusion of social groupings. A similar process may be argued to be taking place here. The new 'urban dream' is really only the dream of the middle-classes. The city is a far more complex place than this postmodern communitarianism would have us think. The urban poor and deviants are, as Robins argues, excluded from the cappuccino lifestyle of piazzas and window-shopping. The islands of urbanity which sustain the unique and particular with which identification may be possible,

51 Bauman, *Postmodern Ethics*, p.46

52 *Ibid.*, p.44

53 K.Robins, 'Prisoners of the city, whatever could a postmodern city be?', *Space and Place: Theories of Identity and Location*, ed. E.Carter, J.Donald, J.Squires, (London, Lawrence and Wishart, 1993), p.321. Conceptions of the postmodern city are diverse. Robins, pp.320-21, notes how Baudrillard, for example, might delight in its very lack of order, rather than seeking a pre-modern sense of place.

exist against surroundings of the have-nots, those who are excluded.⁵⁴

3. Identity and the public space:

We have explored some of the dangers in expressing a non-instrumental identification with the land, in particular how it may serve as a way of hiding structures of power and exploitation, and how the community through which the identity to the land is mediated may be created on the basis of an opposition to those it has excluded.

These group attachments to place were considered in three contexts: the countryside, the nation and the city. As suggested these contexts may not always be entirely distinct and may certainly construct each other. With these qualifications in mind I introduce the argument in this final section through the idea of the city. The argument attempts to move towards an account of how non-exclusive identities might be structured.

The alien in the city, recall, is created by communities attached to place. The alien is essential to this attachment to place. So the alien and the identity defined through attachment to place mutually support and construct each other. It is upon this recognition that we need to build. Robins argues in this regard: 'The diverse and different populations of cities must be seen as active political entities constituted through these encounters and confrontations, and urbanity must be a consequence of the bargaining and negotiation this makes necessary.' For this, it is suggested, we need 'tougher' notions of public space.⁵⁵ In the rest of this chapter I consider what might be meant by these tougher notions of public space, how this relates to non-

⁵⁴ Ibid., pp.322-24

⁵⁵ Ibid., p.326

exclusive identities, and finally how understanding ourselves within this public space offers the beginnings of understanding our way beyond the problems raised by the CJPOA in particular, and more generally, the problems that confront liberal societies as considered in the introduction.

Rabbi Jonathan Sacks in his recent book, The Politics of Hope, emphasises the importance of public spaces. We should not be deterred, in this context anyway, by his aim being one of restoring, or recreating community values, of a Judaeo-Christian tradition, precisely in the kind of imagining of community referred to earlier. Such public goods are the 'conceptual equivalents' of the public space.⁵⁶ To limit him just to the public space, what he does say is of value in this discussion. The public park, he argues, has a moral beauty as a public space: 'We can all go there, and when we do, we go on equal terms. No one person owns it any more than any other. It is an environment where, rich or poor, newcomer or long-standing resident, we stand as equal citizens.'⁵⁷ Nor is it something whose value can be reduced to an aggregate of private spaces if it were to be sold off; its being public is something beyond what a set of private spaces, even if they remained open to the public, might offer.

Part of this something is undoubtedly the inclusiveness of the public space, the fact that it may be a place for everyone. Further, it is a place which might mean something very different to this everybody. As Sacks reminds us the public park is full of busy, and relaxed people, doing very different things.⁵⁸ Not that this park can necessarily serve as a metaphor for the idea of public space that we want to work towards. We have seen public spaces might be partial

⁵⁶ J.Sacks, The Politics of Hope, (London, Jonathan Cape, 1997), p.47

⁵⁷ *Ibid.*, p.198

⁵⁸ *Ibid.*, p.42

spaces, constructed out of and through the exclusion of the urban, and rural, delinquent.

Without doubt in practice the public park is not an inclusive space. But it might serve as an ideal.

In this ideal public space no-one would be excluded. This inclusiveness has consequences for our identity. There is no alien hidden outside the public space so that we might think that only our identity might be held within this space and against this place. Rather inclusion means an awareness of how we construct each other in what Bauman calls the social spacing of our worlds.⁵⁹ This tougher notion of public space is one in which this construction, and consequent fluidity, of identity can be held.

It is a notion which may be interpreted in two different ways: (1) space in its social sense, ways in which we map our relations with each other which may not be entirely physically delimited; (2) space in its physical sense, that through which our bodies move and which property rights partition.⁶⁰

(1) raises some very big problems, problems that take us back to issues discussed in relation to inclusiveness in a Rawlsian society. We do not only identify ourselves in terms of these public spaces. It does mean that as a society we understand ourselves in this public sense. A whole range of issues is raised by this idea of public space as society. In particular there is the possibility of conflict in this inclusive society, one that includes all contradictions and

⁵⁹ Bauman, *Postmodern Ethics*, ch.6.

⁶⁰ This limited approach to space does, at least partially, take account of a certain politics of space. D.Massey, 'Politics and space/time', *Place and Politics and Identity*, ed. M.Keith and S.Pile (London/New York, Routledge, 1993), p.144, argues that the spatial/temporal split is an ideological attempt to close off the spatial, to make it self-contained, and therefore to shut it off from politics. Space used in the first sense here certainly is politicised insofar as it recognises how the spatial is in a constant state of flux; it involves a sense of the temporal, or of the movement of the political.

complexities. Berman points out, 'no doubt there would be all sorts of dissonance and conflict and trouble in this space, but that would be exactly what we would be after. In a genuinely open space, all of a city's loose ends could hang out, all of a city's inner contradictions can express and unfold themselves.'⁶¹

Certainly it is hard to see how these differences might live together without being underwritten by a commitment to a toleration of difference. The liberal hiding of difference might be overcome in this inclusive public space, but for it to remain a social space at all a universal value seems to need to be smuggled back, in marked contradiction of the postmodern emphasis of the exposition of difference through the local and particular. Benhabib comments here that postmodernism seems to suggest a 'super-liberalism', more tolerant and pluralistic than Rawls. But what 'is baffling though is the lightheartedness with which postmodernists simply assume or even posit those hyper-universalist and superliberal values of diversity, heterogeneity, eccentricity and otherness. In doing so they rely on the very norms of the autonomy of subjects and the rationality of democratic procedures which otherwise they seem to so blithely dismiss.'⁶²

Benhabib explores a Habermasian communicative ethic to see how public life may be possible in an inclusive public space.⁶³ However, it is not immediately obvious that the Habermasian idea of public discourse does not involve a similar conception of the person as the Rawlsian theory, the person as reasonable who is willing to engage in such discourse. As was argued, in

61 Cited in Robins, 'Prisoners of the city: whatever could a postmodern city be?', p.326. Bauman, *Postmodern Ethics*, pp.229-230, notes a similar scenario of conflict, arguing that with the social space laid bare as convention, all we have are numerous grass-roots movements attempting to respace the social. The disintegration of much of today's politics into single issues may be understood in this light.

62 S.Benhabib, *Situating the Self*, (Cambridge, Polity Press, 1992), p.16

63 For an introduction see *ibid.*, pp.8-12

chapter five this conception of the reasonable is produced in opposition to the unreasonable. Therefore it produces conflict rather than providing a model through which we may accommodate conflict.

Much more argument is needed here, of course. But let's leave this idea of the inclusive public space, which we have been attempting to work towards throughout this thesis as still incomplete. With it we need to abandon the search for the non-exclusive identities that might exist in this public space. Not that this turning should necessarily be seen as a failure. For what this consideration of identity has led us to is the idea of the public space. We may now look at the second more limited sense of public space to see how this might help us understand the conflict produced by the CJPOA.

So to (2). We have come full circle, back to property, with this sense of public space as public places, for it is property rules which define these public spaces. I suggest that we need, at least, public property rules to guarantee an inclusive public space in the way outlined above. The ways of life proscribed by the CJPOA can only be accommodated within, at least, some system of public property.

Private property, as we have seen, excludes in two different ways: (2.1) the obvious, conceptual sense in which if Y has private property in something it is in her power to exclude who she wants from using or access to that thing. It was the possibilities of exclusion on this level that were explored in the third chapter. Recall, that it was argued that some accounts of liberalism might be flexible enough to be inclusive here, or at least to include the hypothetical demands of the groups targeted by the CJPOA. (2.2) The deeper sense in which private

property as part of liberal justice needs to exclude to substantiate the subject of this justice. It is a consideration of the CJPOA within this second type of exclusion that has formed the focus for most of the rest of the thesis.

So there is an exclusion to do with property specifically and an exclusion to do with property's part in liberal justice as a whole. Can private property theory overcome either or both kinds of exclusion? Let's take (2.2) first.

Earlier in this chapter I briefly referred, contra Marx, to the possibility of non-instrumental property; such a possibility might avoid the second type of exclusion by proposing a non-liberal identity, of the kind discussed in the previous section, with the land. Assuming this possibility, for which admittedly much more argument is needed, two more questions need to be asked: (2.2.1) what form might such a theory take?; (2.2.2) how might it avoid being exclusive?

As for (2.2.1), briefly, an obvious place to start might be thought to be the property theory of Hegel which is very different from those considered so far.⁶⁴ In the relation, X has certain rights over Y as regards Z, for Hegel Y is part of X's self-development, and therefore much more closely linked to who we are, rather than being a strict resource for the use of X. It is unnecessary to go into the complexities of Hegelian thought here; what is important to note is that Y is still functioning to serve the ends of X, although in a different way from in the interest and libertarian theories of property. Its role is still defined by the ends of X.

⁶⁴ See F.Hegel, *The Philosophy of Right*, trans. T.M.Knox, (Oxford, Clarendon Press, 1952), pp.37-57, for his account of property. It is important to note that Hegel is not actually offering so much of an argument for private property as a description of its rational necessity as a social institution; see Waldron, *The Right to Private Property*, p.345.

Psychological arguments for private property advocate a similar self-developmental view of private property. Psychological studies reveal that the central feature of private property is the personal control it gives the rights-holder, giving them a vital sense of control over their environment.⁶⁵ But again the external world is separated from us in the very act of playing an essential part in our lives. It is made a function of the human.

However, these arguments take us in the right direction. Clearly, what is needed is not a developmental process in which Y becomes tied back into the ends of X but an already existing state of affairs. In practice one might find such examples of a property relation as regards the land when people claim an identity with a particular piece of land, or what might be called a 'sense of place'. What such a sense might mean is of course hard to say; we have already discussed the nature of this identity in part in the previous section's consideration of non-instrumental relations with the land. Certainly though, the idea of home captures some of its meaning; the house becomes not just a pile of bricks and mortar but an aspect of who we are. Property rights may be important to preserve such an identification because it guarantees the non-interference of others. Arguably, one cannot continue an identification with a place if it is constantly being transformed by others.

So much for the outline of a possible theory. Of course, it is not a complete theory in the sense of providing a way of understanding all our property relations, but it may provide for some. What it cannot do, and so to question (2.2.2), is avoid the problem of exclusion. One person's identity with a piece of land protected by private property rights is another person's being outside of that identification. The point of private property rights in such a situation is to

⁶⁵ See, for example, J.Christman, 'Distributive Justice and the Complex Structure of Ownership', *Philosophy and Public Affairs*, 24 (summer 1994), p.235-37.

preserve this exclusion. This person's identity is built upon the exclusion of others.

Alternatively, exclusion (2.1) above of private property, that private property is conceptually exclusive, might simply be challenged. As explored in chapter three there is nothing incoherent about owners relaxing their rights to exclusive use and so on over things so that other people can enjoy these goods. Yet such public spaces would be contingent on private control. As such they would merely confirm the conception of the subject as autonomous chooser that has been isolated as the source of the exclusions explored in this thesis.

By default therefore we come back to, or arrive eventually at, public property. I do not propose to offer a sustained argument in favour of this system of property. It lies at the limits of this thesis, not something to be explored, but something which may cast a shadow on what has gone before. Most usefully, perhaps, we can first consider, in very practical terms, how public property might help overcome some of the conflicts caused by exclusion.

Travellers: As noted in the first chapter, the CJPOA removes the obligations upon local authorities to provide sites for travellers. Although this obligation was in practice never properly fulfilled and was not deemed to cover new age travellers, it did at least in theory provide spaces defined by public property rules for travellers to stop and stay at. Without these spaces travellers may be forced to trespass on private land in order to sustain their way of life. Therefore these public sites may be an important condition in the accommodation of this way of life.

Raves and festivals: Similar arguments may apply to raves and festivals. Their occurrence

may involve trespass on private land if there are not public sites provided. As goods they may be accommodated through these public sites.⁶⁶

Protesters: The cases of the hunt saboteur or the road protester are slightly different from the traveller and festival goer. In particular we need to note here that the giving of public rights of access to protest may appear to increase conflict by allowing the possibility of confrontational situations. However, this is a conflict that tries to include diverse goods, rather than excluding one altogether through its criminalisation. Accepting that protesting may be, or aims towards, a good, it is one that may be sustained by public rules defining access to land for protests.

As these suggestions are only provisional and not meant for detailed interpretation, I make only one observation on them. These suggestions are hardly immodest. They certainly do not demand widespread intrusion into private property rights, though they call for some limited intrusion. It may be objected that such intrusions, however limited, will themselves be a source of increased conflict with the private landowners that they affect. To answer this objection we need to give a closely considered account of why public property rights may sometimes as a matter of justice intrude on private property rights, a possibility which would mean limiting the autonomy of the self which lies at the justificatory basis of these rights. This is not an account that can be given here, but perhaps, if nothing else, this thesis has shown the importance of giving such an account, and how these problems of property are linked to the wider problems of inclusion and diversity that liberal societies need to face.

⁶⁶ Raves and festivals are not, as explained in chapter one, prohibited by the CJPOA. They must, however, be licensed. Here I am referring to the unlicensed free rave/festival.

Conclusion:

These suggestions for public spaces to help the problems that the CJPOA poses may seem to constitute a rather downbeat conclusion to this work. In a sense this is right. This chapter's search for non-exclusive identities within a public space has not been successful. It began with an analysis of instrumentality and in particular how an instrumental relation with the land is a separating one. In contrast an ecological, non-instrumental identity with the land was offered. Certain dangers were noted with such an identity, specifically how it might be merely a mask for exploitation as we saw in the section on the CJPOA, and how the group through which this identity is mediated is one constructed in opposition to those it excludes. Therefore the idea of a group attachment to a specific piece of land is fraught with the problems of exclusion that were noted as central in our account of liberal justice. It was for this reason that we moved towards the idea of the public space as the space in which non-exclusive identities might be possible.

At the same time, and despite its irresolution here, the idea of public space has allowed us to articulate, in terms of the public rights that would structure such a space, how a specific problem such as that posed by the CJPOA might be addressed. In this sense this chapter has followed the movement of this whole work, in its shifts from the practical and the particular to the theoretical and the general. A theoretical impasse allowed us at least to offer practical suggestions to a particular problem. The extent to which these practical suggestions might take the theoretical search forward cannot be investigated here.

Conclusion

The introductory chapter to this thesis set up a particular problem. It was a problem that concerned property in land, and how private property in land might exclude other interests from that land. In particular, it suggested, the CJPOA may be seen as central to this debate over the land question with its criminalising of various activities that might take place on land. It asked whether certain hypothetical demands of these targeted groups might be compatible with the liberal defence of private property. It suggested that the answer to this question would both inform and be informed by a broader understanding of liberal justice, relating most specifically to questions of inclusion in a liberal society.

This thesis has thus been involved in exploring a particular problem, the compatibility of the demands of the groups targeted by the CJPOA with liberal property theory, within the wider context of the development of an understanding of liberal justice. If the success of this work is to be judged by the extent to which sure conclusions have been reached on (1) this compatibility, and (2), how our understanding of liberal justice has been broadened in the reaching of these conclusions, one would be forced to admit that its success is hardly unmitigated. In bringing an end to this work I reflect briefly on the significance or otherwise of this mitigated success. Such reflection does not only involve the conclusions on the two problems posed, but as importantly on the relation between them.

So, as for (1), chapter six ended the rather tortuous search for an answer to the compatibility between the hypothetical demands and the two theories of property, the libertarian and the welfare liberal, as presented in chapters two and three. Recall that at the end of chapter three

it was concluded that the libertarian theory of property is incompatible with one of the demands. The welfare theory of property may accommodate both demands. These conclusions sat in apparent contradiction of my intention as stated in chapter one to argue for the CJPOA as an instantiation of liberal justice. To show that both theories of property might be incompatible with the hypothetical demands they were situated within a broader discussion of liberal justice and in particular how such a system of justice might exclude certain interests.

The answer given may perhaps have been unsatisfactory after so long a discussion. It was concluded at the end of chapter six that the two demands may be incompatible with the liberal defences of private property, but only if seen within a certain understanding of liberal justice as committed to excluding certain interests. Furthermore, even accepting this qualification on the conclusion, we could not be sure that welfare liberalism, at least, is incompatible with both demands.

Turning to (2), in a sense though, this inconclusiveness in the conclusion on the particular problem set up is not very important. For what has been elucidated through discussion of the possible compatibility is a certain reading of liberal justice more generally. Chapters four, five and six were central to this reading. In these chapters, through an analysis of the self of liberal justice, it was suggested that such justice, far from being committed to stability and inclusion, is committed to conflict and exclusion. It was within this context that we might see the CJPOA as an instance of liberal justice.

It is worth outlining the structure of the argument which leads to this conclusion. We start with the specific problem of the demands of the groups targetted by the CJPOA as opposed to

liberal property theory. The impasse we reach in exploring their compatibility is breached by our consideration of more general problems in liberal theory. These considerations are then fed back into analysis of the CJPOA and we come to understand its criminalising of certain groupings as typical of liberal justice. In turn, this sharpens and extends our understanding of the production of criminality in liberal justice as a whole. Thus to understand the possible success or otherwise of this thesis one needs to be aware of the movement between the particular and the general questions that it is considering.

It is important to see as well how the differing answers to the particular, or (1), and the general issues, or (2), we explored may inform our understanding of the relation between the theoretical and the applied in critical thought. This thesis has made a deliberate attempt to develop theory out of the applied and then with a new understanding of the applied redevelop theory. That we may be convinced of the theory of liberal justice that is developed out of this process, but not of exactly of how this theory may impinge on interpretation of the CJPOA, except from a particular angle, simply shows how difficult it is for theory to grasp the complexities of practice in which events and actions may be seen from many different angles.

This movement between the particular practice and the generalised theory continues in the last chapter which marks a change of direction in its attempts to suggest the beginnings of ways beyond the type of problems that legislation such as the CJPOA embodies for liberal justice. Again its conclusions might seem rather disappointing in their restricted nature. Interestingly, in the need for public spaces defined by public property rules they provide a specific answer to the particular and applied problem of the CJPOA but the more general sense of public space provides only more questions as to how non-exclusive identities might co-exist. These

conclusions are the reverse of the ones described above in which our conclusions on the particular problem were confused, but our theoretical position had been significantly developed. To what extent these practical specific conclusions might provide a starting-point from which to evolve new theoretical positions on the problem of different forms of life living together is far from certain. What I hope to have shown through my consideration of the CJPOA, as an instance of the problems that liberal societies face, is that this is a task that needs to be undertaken.

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