

PHIL 167; Fall 2005

David Brink; UCSD

Handout #4: Nozick's Libertarian Liberalism

Libertarianism is typically a rights-based conception of moral and political philosophy that takes rights to liberties to be fundamental. Traditional libertarians (e.g. Hayek, Friedman, and Nozick) usually derive competitive capitalism and limited government from this starting point, though a group of recent libertarians (e.g. Otsuka, Steiner, and Vallentyne) has been developing a different form of left-libertarianism. We will focus primarily on right-libertarianism, especially the views of Robert Nozick (1938-2002) in Anarchy, State, and Utopia (1974), because he is the philosophically most sophisticated libertarian. Here is a sample of questions we need to pose for libertarianism. What does it mean to take liberty as the basic value? Is liberty the only basic value? Are all liberties equally valuable? Does recognition of the importance of liberty support a laissez-faire economy or limited government? How revisionary is the libertarian's minimal state, and how should this affect our attitude toward libertarianism? Liberals recognize individual rights against others and the state. Libertarianism is one form of liberalism. Is it the most plausible? In discussing worries for Nozick, we need to ask if they are worries for libertarianism per se, or only for right-libertarianism.

NOZICKIAN LIBERTARIANISM

According to Nozick, a minimal state can arise without violating anyone's rights; any more extensive state would violate people's rights to liberty. In particular, the state is entitled neither to engage in paternalism nor to redistribute holdings so as to achieve some pattern of distributive justice.

FOR THE MINIMAL STATE

Nozick describes a process by which the minimal state can and should arise without violating anyone's rights.

1. State of Nature (SN) → Cooperative Protective Associations (CPAs)
2. CPAs → Private Protective Associations (PPAs)
3. PPAs → Dominant PPA (DPPA) (= ultraminimal state (US))
4. DPPA/US → Minimal State (MS)

Following John Locke (1632-1704), Nozick understands SN to include certain rights.

1. Each individual has a right to act as she sees fit provided that she harms no one else nor deprives others of their liberty.
2. Each individual has a right to be free from harm and interference from others.
3. Each individual has a right to punish those who violate the rights of others, and the person whose rights are violated has a right to exact compensation (ASU: 10).

Because individual private enforcement is not always efficient or reliable, CPAs will be formed. But CPAs suffer from some problems (ASU: 12-13).

- (a) Each member is always on call; this is likely to be disruptive for all and painful to smaller, weaker members.
- (b) Members less in need of services will find that they are carrying more than their share of the protective burdens.
- (c) It is not clear how disputes among members of the association are to be handled.

The obvious advantages of a division of labor and economies of scale lead to PPAs that offer protection policies, much as insurance companies offer protection against loss. But there will be inter-PPA disputes. There are three possibilities.

- 1. The PPAs will do battle and one will win;
- 2. The PPAs will adopt different territories; or
- 3. The different PPAs will submit to the judgments of a common tribunal.

Under each of these alternatives, there emerges, within a given area, a DPPA (ASU: 14-17). The DPPA is the ultraminimal state. It differs from MS insofar as

- (1U) it protects only those who have purchased policies (not independents) and
- (2U) it allows independents to punish its members (appropriately) (ASU: 22-6).

By contrast, MS would

- (1M) protect all those within its domain and
- (2M) claim a monopoly on the use of punishment.

But the DPPA will give way to MS. For a DPPA will see such independents as imposing undue risks on its clients and so will prohibit them from self-enforcement of their rights. According to Nozick, clients of the DPPA must compensate independents for the way in which the DPPA's prohibition diminishes the deterrence-value of its own procedures. The way to do this, Nozick claims, is for the DPPA to extend protection to independents and for existing clients to subsidize these new policies (ASU: 108-115).

QUESTIONS ABOUT THE JUSTIFICATION OF THE MINIMAL STATE

Nozick argues that the DPPA can prohibit independents from using their own enforcement procedures, when it deems these unreliable or unfair, provided that it compensates the independents. But this is impermissible if the DPPA deprives independents of their rights (in the state of nature). The DPPA cannot prohibit independents from self-enforcement without violating their rights -- even if they provide compensation. Compare: I can't saw off your left leg without your permission, even if I pay you compensation. Even if I pay you compensation, I've still violated your right. Indeed, this is why I owe you compensation. But then it looks like the DPPA cannot prohibit independents from self-enforcement without violating their rights -- even if they provide compensation (Nozick recognizes some tension between the principle of compensation and natural-rights theory himself (75), but not this one.)

Perhaps it's Nozick's view that the DPPA's prohibition does not violate any right to self-enforcement that the individual has. He might claim that DPPA prohibition does not prevent the independent from self-enforcement, it just diminishes the value of self-enforcement to the

independent, because (a) the DPPA will retaliate for the independent's exercise of self-enforcement and (b) the deterrent-value of the independent's threat of self-enforcement will, as a result of (a), be greatly reduced (cf. 110). This defense places great weight on the distinction between **having a right** and being free to exercise it, on the one hand, and **the value of having the right** and exercising it, on the other hand. We may wonder how much it means to say that rights are inviolable if their inviolability is compatible with their value being completely eroded.

Alternatively, Nozick might grant that the DPPA's prohibition infringes the liberty of independents but insist on a moralized conception of rights, in general, and a right to liberty, in particular, according to which a right to x acts as a side-constraint, not on all interferences with x, but rather with unjustifiable interferences with x. Nozick seems committed to a moralized conception of rights to liberty, in any case, by virtue of his conception of them as near absolute side-constraints. Liberty gets restricted in order to prevent serious harms to others and particular liberties (e.g. to private property) may conflict with other liberties (e.g. to make use of any resource as one chooses). If rights are side-constraints, then it seems they must never or very rarely conflict. But then a right to liberty must be either (a) a cluster of rights to particular liberties or (b) a right to liberty from unjustified interference (see below). The independents don't have a right to use unreliable or unfair enforcement procedures, because these would be unjustifiable interferences with the liberty of others. But notice that the DPPA prohibits not just the procedures of independents that are in fact unfair or unreliable, but rather the procedures that it deems unreliable or unfair or which are simply unknown to it. Perhaps Nozick can claim that this is a justifiable form of interference with the liberty of independents and so violates no (moralized) right that independents possess. But this raises obvious questions. What is to count as a justifiable interference with someone's liberty? And if avoidance of risks that one considers undue is sufficient justification for infringing liberty, perhaps there will be many forms of interference with individual liberty that the state is justified in undertaking.

In examining Nozick's arguments against the extraminimal state later, we will see that libertarians seem required to forego **public goods**. We will examine the public goods problem in more detail later. For present purposes, we can note that because public goods are nonexcludable (the benefits of the good are available to both those who have contributed to the provision of the good and those who have not), their provision is subject to a **free-rider problem**. Individuals will see that they can enjoy the benefits of the good's provision without the costs of contributing to its provision. But if enough people reason this way, the good won't be provided. The immediate relevance of this problem is that creation of a state, even with only Nozick's nightwatchman functions of enforcing contracts and preventing fraud and harm, seems to be a public good itself. Most, if not all, of the benefits of the DPPA accrue to noncooperators (Nozick's independents) as well as to cooperators (clients). If so, creation of the minimal state or even a DPPA would seem to be threatened by free-riding. Nozick discusses this problem briefly (ASU: 113), but it's not clear that his response is satisfactory.

AGAINST THE EXTRAMINIMAL STATE

An entitlement theory of justice in holdings supports the minimal state; alternative theories that would require the state to redistribute holdings involve impermissible restrictions on individual liberty.

THE ENTITLEMENT THEORY

The entitlement theory defines just holding in terms of three principles of justice: justice in **acquisition**, **transfer**, and **rectification** (ASU: 150-51).

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to that holding.
3. A person who acquires a holding in accordance with the principle of rectification is entitled to that holding.
4. No one is entitled to holdings except by (repeated) applications of (1)-(3).

The entitlement theory seems to state the **form** that a theory of justice should take. Its political implications seem to depend upon its **content** – specifically, the content of the principles of justice in acquisition, transfer, and rectification. Indeed, one wonders whether **any** theory of justice couldn't be represented as a kind of entitlement theory. Given Nozick's political conclusions, it is surprising how little he says about the content of his entitlement theory.

ACQUISITION

Nozick's theory of justice in acquisition develops Locke's labor theory of property (ASU: 174-82).

Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being removed from the common state that nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others [Second Treatise of Government §27; cf. §33].

Nozick raises some good general questions about the labor theory of property, without answering them adequately.

- Why does mixing one's labor with x generate property rights in x?
- Why isn't it a way of dissipating one's labor?
- Why isn't it a way of acquiring rights to the value added to x?

Nozick does a little better in addressing more specific, internal questions for the labor theory.

- Is labor necessary?
 - Abundance only requires appropriation; scarcity requires labor.
- How to understand the proviso that one's appropriation of x not make others worse-off?
 - Worse-off in what respect?

- Worse-off with respect to x ?
- Worse-off with respect to x -type goods?
- Worse-off in terms of overall utility (drug and beach examples)?
- Worse-off compared to what?
 - No property rights.
- We can characterize this interpretation of the proviso in terms of **Pareto Superiority**. Pareto Superiority is usually understood as a relation among preferences.
 - X is Pareto Superior to Y iff at least one person prefers X to Y and no one prefers Y to X .
 - X is Pareto Superior to Y iff at least one person is better off under X and no one is better off under Y .

Nozick's proposal is to understand the proviso so that an initial acquisition is just provided that it produces a state of affairs that is Pareto Superior to the state of nature.

- Is the state of nature the appropriate baseline of comparison for the proviso? Why not consider alternative possible distributions of property rights?

Suppose JR and Miss Ellie are the sole survivors of the shipwreck of a luxury liner and they wash up on an uninhabited island.

- If neither had appropriated the land, and each exercised his or her own powers separately on the common land, their respective utilities (in this state of nature = world 1) would be JR \underline{w} and ME \underline{x} , where $\underline{w} > \underline{x}$.
- Suppose (world 2), however, that while ME is otherwise occupied (e.g. still unconscious, tending JR's wounds, or searching for food), JR appropriates the land and offers ME a job (e.g. raising vegetables, clearing rocks off the beach, catching fish for dinner). JR divides the proceeds of ME's work between them: JR receives goods and services worth \underline{y} and ME receives goods (rations) worth \underline{z} , where \underline{y} is considerably greater than \underline{z} , but \underline{z} is equal to or marginally greater than \underline{x} .

Is JR entitled to this greater share (\underline{y}) of the $\underline{y} + \underline{z}$ product just because he got there first and had entrepreneurial designs on the island while ME was either unconscious or worrying about JR? Is it just that "nice gals finish last"?

- Presumably, if ME had beaten JR to the punch, she could (at the very least) have adopted the same terms of cooperation (whatever they were) and kept \underline{y} for herself and given JR \underline{z} (provided \underline{z} is equal to or greater than \underline{w}) (world 3). Assume, as is likely, that the division of labor JR institutes in W2 is inefficient (he's not too good an organizer and, of course, he gave all the physically demanding jobs to the weaker ME).
- Had ME appropriated first, she would have devised a more efficient division of labor (she might have devised new technology and she certainly would have made JR do a non-negligible share of the hard work) (world 4). Suppose, as seems likely, that the total output in W4 would have been considerably larger than $\underline{y} + \underline{z}$ and that ME would have distributed it in a more egalitarian manner -- \underline{p} to JR and \underline{q} to herself, where \underline{q} is equal to or greater than \underline{p} and \underline{p} is greater than \underline{y} .

We can represent these possibilities in the following table.

| | J.R. | Miss Ellie | Constraints |
|---|---------------------------|---------------------------|---|
| W1 (state of nature) | \underline{w} (e.g. 7) | \underline{x} (e.g. 4) | $\underline{w} > \underline{x}$ |
| W2 (JR's appropriation; his division of labor) | \underline{y} (e.g. 15) | \underline{z} (e.g. 8) | $\underline{z} \$ \underline{x}; \underline{y} > \underline{z}; \underline{z} \$ \underline{w}$ |
| W3 (ME's appropriation; same division of labor as W2) | \underline{z} (e.g. 8) | \underline{y} (e.g. 15) | |
| W4 (ME's appropriation; her more efficient division of labor) | \underline{p} (e.g. 16) | \underline{q} (e.g. 16) | $\underline{q} \$ \underline{p}; \underline{p} > \underline{y}$ |

Why should we judge the justice of W2 solely by comparison with W1, ignoring possibilities W3 and W4?

- Is it enough for the proviso to be satisfied at the time of initial acquisition, or must it be satisfied continuously (including after bequest)?

TRANSFER

Nozick appears to believe that voluntary exchange is both necessary and sufficient for justice in transfer. But **externalities** raise questions about such an account of justice in transfer. Externalities are effects (positive or negative) of market exchanges that are not taken into account in the exchange (e.g. not reflected in the price at which goods are bought and sold). Externalities are inefficiencies in market transactions; **negative** externalities are inefficiencies of overproduction, whereas **positive** externalities are inefficiencies of underproduction.

VOLUNTARY EXCHANGE AND NEGATIVE EXTERNALITIES

Negative externalities raise the question whether voluntary exchange is sufficient for justice in transfer. Some negative externalities are direct (e.g. pollution). State intervention is the usual remedy.

1. The government may prohibit by law the behavior that produces the negative externality altogether;
2. It may tax the production or sale of the good so as to make production and consumption reflect the full costs of the good;
3. It may regulate production by adopting production standards designed to limit externalities (e.g. industry quality or pollution standards); or
4. The government may allow affected third parties to sue producers for compensation for the costs that the externalities impose on them.

Other negative externalities are **indirect**. Market exchanges within a system of private property rights redistribute holdings and (can) produce inequalities. These inequalities have negative

relational effects on third parties, which, in turn, produce negative intrinsic effects. Here, the usual remedy is redistributive taxation (e.g. inheritance taxes and progressive income taxes).

VOLUNTARY EXCHANGE AND POSITIVE EXTERNALITIES

Positive externalities -- in particular, **public goods** (PGs) -- raise the question whether voluntary exchange is necessary for justice in transfer. Roughly, a public good (PG) is any object or state of affairs such that if it is available to some member(s) of a group it is available to all others -- including those who have not shared in the costs of producing it (= the good is nonexcludable). PGs include clean air, energy conservation, population control, political participation, education, and national defense. There are (I count) five conditions that make a good a PG.¹

1. Widespread, but not universal, contribution is both necessary and sufficient for the good to be produced (in the case of goods whose provision is all or nothing) or for large quantities of the good to be produced (in the case of goods whose provision is continuous).
2. If the good is produced, it is available to all, even to noncontributors; it is impossible or impractical to prevent noncontributors from enjoying the good (= the good is nonexcludable).
3. Contribution is a nonnegligible cost.
4. The effect of individual contributions on securing the good or on the amount of the good available to individual contributors is negligible; or, if some possible contributions have nonnegligible effects (say, because of threshold phenomena), then it is the antecedent likelihood of an individual's contribution being one of these that is negligible. (This condition includes a noninterdependence of behavior assumption.)
5. The amount of the good that each individual would gain from widespread contribution outweighs the costs of his share of contribution.

(3) and (4) imply that the cost of individual contribution exceeds the (expected) marginal return on individual contribution. But then -- despite (5) -- the provision of the good is threatened by at least two problems.

THE FREE-RIDER PROBLEM

The first barrier to successful collective action is the **free-rider problem**. It will be rational not to contribute.

1. Whatever I do -- whether I contribute or not -- either (a) enough others will contribute to produce the good or they will not (if the good's provision is all or nothing) or (b) my contribution will have a negligible effect on the amount of the good available to me (if the good's provision is continuous).
2. My contribution is a nonnegligible cost to me.
3. If enough others will contribute, either (a) the good will be provided and my contribution would be a waste or (b) the good will be produced and my contribution will have a negligible impact on the amount of the good available to me.

¹Sometimes people add the further stipulation that the goods be **non-rivalrous** -- such that one person's consumption of the good does not reduce the amount of the good available for others. But few goods are genuinely non-rivalrous in this sense. Even if my consumption of clean air leaves you with plenty or all you desire, it does reduce the total amount of clean air available for consumption by you and others. In any case, I don't see that the goods that concern us need be non-rivalrous if they satisfy the other five conditions.

4. If enough others won't contribute, either (a) the good will not be produced and my contribution would be a waste or (b) a very small amount of the good will be produced and my contribution will have a negligible impact on the amount of the good available to me.
5. Hence, either way, the cost of my contribution exceeds the (expected) marginal return on my contribution.
6. Hence, I should not contribute.

As many have noted, the free-rider problem is an **n-person prisoner's dilemma**.

| | | OTHERS | |
|----|------------------|---------------------------|------------------------------|
| | | Contribute | Don't Contribute |
| ME | Contribute | Benefits 2 Costs | No Benefits 4 Costs |
| | Don't Contribute | Benefits 1 No Costs | No Benefits 3 No Costs |

For every rational individual, noncooperation strictly **dominates** cooperation. If so, rational individuals cannot, in principle, secure PGs. (For the classical PD-situation, substitute "stay silent" for "contribute" and "rat" for "don't contribute" and put the following values in boxes (1)-(4): (1) I go free, you get 12 yrs; (2) we each get two yrs; (3) we each get 10 yrs; (4) you go free, I get 12 yrs.)

THE ASSURANCE PROBLEM

The second barrier to successful collective action is the **assurance problem**. An individual who does not intend to free ride may nonetheless be willing to contribute to the production of the good iff she is assured that others will contribute as well (NW box preferred to SW box). But as long as there is reason to believe that enough others will not contribute (e.g. because they will free ride), the individual will not contribute.

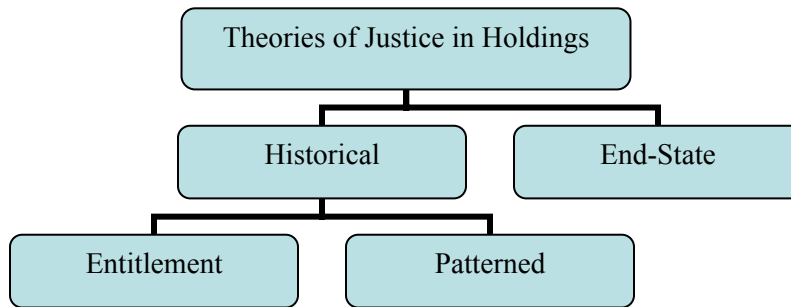
In competitive markets, one will gain a competitive advantage on other firms by free riding; so free-rider problem will be the dominant barrier to PGs in the competitive markets. The usual remedy for these collective action problems is for the state to provide the good itself and fund the costs of production through compulsory taxation (e.g. as in the case of education, international and domestic defense, public parks).

RECTIFICATION

Until we know "how far back we must go in wiping clean the historical slate of injustices," how do we know that the entitlement theory supports a minimal state? For instance, should we rectify for violations of property rights that occurred in American slavery and in the appropriation of Native American lands?

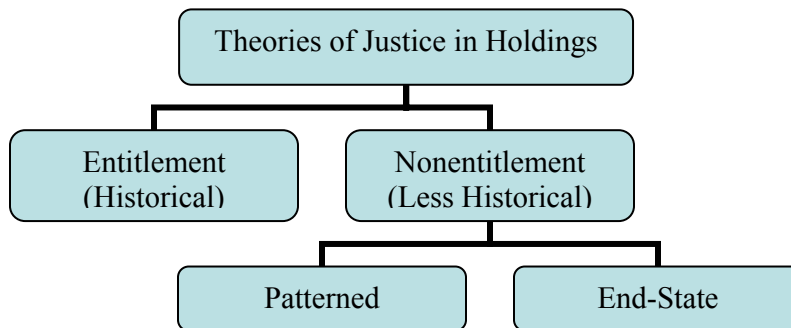
JUSTICE IN HOLDINGS

Nozick's official taxonomy goes like this:



End-state theories are current time slice principle that make the justice of a set of holdings depend only on the sum and/or distribution of value. **Historical** theories make the justice holdings depend upon past circumstance of the distribution in some way. A principle is **patterned** if it makes the justice of a distribution depend upon some historical property of distributes, rather than their past actions (e.g. need, effort, merit, IQ). **Entitlement** theories say that the justice of holdings depends upon the past actions of the holders and how they came by their holdings.

But this taxonomy is puzzling. Nozick seems to think that patterned theories have more in common with end-state theories than with entitlement theories. His criticism of patterned theories is supposed to apply to Rawls' Difference Principle, an end-state view. And most patterns are not historical. An alternative taxonomy would be as follows.



WILT CHAMBERLAIN

Nozick believes that voluntary exchanges are justice preserving: if D2 is unjust, then D1 must have been unjust. Because D1 satisfies the pattern, and liberty upsets any pattern (nonhistorical principle), all patterned (nonhistorical) principles must be mistaken.

1. Voluntary exchanges are justice preserving.
2. Hence, if D2 is unjust, then D1 must have been unjust.
3. D1 can satisfy any pattern (nonhistorical principle).
4. Voluntary exchange can upset any pattern (nonhistorical principle).
5. Hence, all patterned (nonhistorical) principles must be mistaken.

This is what is supposed to be demonstrated in the Wilt Chamberlain example. Two issues:

- Is (4) true? D2 upsets the pattern of income distribution; so, for example, it upsets the pattern requiring strict equality of income. But does it upset all patterns?
- If a pattern determines the justice of particular transactions directly, does anyone hold a patterned theory? Consider Rawls's Difference Principle which applies to the basic structure of society (e.g. TJ 87-88). Would a utilitarian endorse constant interference with market transactions? Does equality of resources require that some pattern be observed over time?

ARE ALL OPERATIONS OF THE MARKET MORALLY INNOCENT?

Market exchanges within a system of private property rights redistribute holdings and (can) produce inequalities. Such inequalities can have negative relational effects on those who become comparatively worse-off. They affect people's relative levels of well-being, and this affects their bargaining position insofar as it allows some to hold out for better terms of cooperation. Hence, these inequalities produce further inequalities and make the worse-off worse-off than they would otherwise have been. If so, negative relational effects of market exchanges produce negative intrinsic effects.

Should parties to these exchanges (e.g. basketball fans) participate on these terms if they calculate indirect, as well as direct, costs? These indirect costs include negative externalities, whether intragenerational or intergenerational (contrast ASU: 161).

These negative externalities appear to run afoul of Nozick's own prohibition on uncompensated sacrifices (ASU: 32-3).

These negative externalities seem unfair, especially in the intergenerational case. It may seem that one should not be disadvantaged as the result of factors outside of one's control. If so, we should control the effects of the social lottery. Must we also try to control the effects of the natural lottery? Nozick thinks not. He denies that entitlements must be "earned all the way down" (ASU 225). But we can maintain that both the social and natural lotteries are morally arbitrary. We need to distinguish four claims.

1. I am entitled to possess my natural endowments, though they are unearned.
2. I am entitled to exercise my natural endowments (in acceptable ways).
3. I am entitled to benefit from the exercise of my natural endowments (assuming they're productively employed).
4. I am entitled to all the benefits (that I can get others to concede to me) from my exercise of my natural endowments.

(1)-(3) do not imply (4).

Does unfettered operation of the market within a system of private property rights affect the voluntariness or moral quality of transfers over time?

NOZICK'S MORAL THEORY

Nozick seems to have a direct argument against the extraminimal state from his assumptions that rights are side-constraints and that our most basic right is a right to liberty. Are these assumptions defensible?

WHY SIDE-CONSTRAINTS?

As Nozick himself notes, if x is so important, why not maximize x or minimize violations of x (cf. ASU: 28-33)? Nozick's own answer is to appeal to the **separateness of person** and the **Kantian demand** that we treat all agents as ends and never merely as means. But suppose that only by causing harm to B can A prevent individually comparable harms to C, D, and E. Kant's demand requires that one treat rational agents as ends and not merely as means. If A harms B only in order to protect C, D, and E, perhaps A treats B as a means, but he need not treat her as a mere means. To do that would require viewing her as a mere instrument or tool, not as someone whose own agency is valuable. But A need not view her that way; he can take her agency into account. If so, A proceeds, but with great reluctance that derives from a concern with her agency; if A could have protected C, D, and E without harming B, he certainly would have. If A acts impermissibly in acting so as to minimize harm, it is not because in so acting he must be treating those whom he harms as mere means.

Some defend side-constraints by appeal to **inviolability**. But to treat B as inviolable in this way requires turning a deaf ear to the comparable interests of C, D, and E. This arguably denies them moral **considerability**. We want to take seriously the fundamental interests of each. But do we want to endorse inviolability at the price of considerability?

WHICH SIDE-CONSTRAINTS?

If rights are side-constraints, there can be no right to liberty per se. Liberty is permissibly restricted, even within the minimal state, in order to prevent harm to others, as in familiar provisions of the criminal and civil law. Moreover, private property rights restrict the liberty of non-owners.

1. Rights are side-constraints.
2. Side-constraints on conduct are near absolute prohibitions of that conduct.
3. Hence, rights can rarely if ever conflict.
4. Rights to liberty per se (i.e. to be free to do as one wishes) conflict with other rights we have (e.g. against harm by others and to own property).
5. Hence, we don't have rights to liberty per se.
6. If rights are side-constraints, we must either (a) recognize only rights to basic liberties or (b) moralize liberty, so that we have a right to be free from unjustified interferences with our liberty.

Either way, we lose any direct argument from a rights-based conception to libertarianism and the minimal state.

Nozick does attempt to justify libertarian side-constraints by appeal to their role in a meaningful life in which rational agency is exercised (ASU: 49-50). But this rationale may not support as extensive a set of basic liberties as Nozick assumes or the purely negative conception of rights that he requires.