Nozick’s Libertarianism: Some examples

Dick Arneson

In chapter 4 of *Anarchy, State, and Utopia*, Robert Nozick considers these questions: “Are others forbidden actions that transgress the boundary [of individual rights] or encroach upon the circumscribed area, or are they permitted to perform such actions provided they compensate the person [fully] whose boundary has been crossed?” (p. 57). Seeing objections to the answer “they are permitted,” he asks: “Why not prohibit all crossings of the moral boundary that the party impinged upon did not first consent to? Why ever permit anyone to cross another’s boundary without prior consent?” (p. 59). His discussion identifies moral considerations he deems relevant to the answers to his questions, but that do not so far as he can see decisively settle them.

We can also ask: If crossing a moral boundary of a right is forbidden, how should we regard actions that risk crossing a boundary? Does Lockean natural rights theory forbid or permit actions that raise the probability that another person will suffer wrongful harm (to which the person does not consent)? Another question: is any imposition of wrongful harm on another without her prior consent always forbidden no matter how small the harm to person or property? Railton’s essay “Locke, Stock, and Peril” discusses these questions with a view to exposing what he takes to be problematic features of the Lockean position.

Here are some examples to consider. You might use them or others you devise to test your understanding of Nozick’s position and the plausibility of that position or some amended version of it you find promising.

1. Hiker in storm. A hiker in a remote region is caught in a blizzard and will freeze to death unless he finds shelter. He chances upon a privately owned cabin. He could trespass and burn some furniture in the fireplace to stay warm and eat some food he finds in the pantry. There is no possibility of negotiating with the landowner to try and obtain prior consent to this trespass, and there is a large No Trespassing sign posted at each edge of the property on which the cabin sits. His choice is to respect the private property right of the landowner or trespass and live.

1a. *Vincent v. Lake Erie Transportation Co* (1910). An American tort law case. A ship’s captain ties his ship to a dock, to prevent it from being damaged and perhaps sunk in a Great Lakes storm. The storm bashes the lashed ship against the dock repeatedly and the dock is damaged. The dockowner sues the shipping company that owned the ship for the damages to the dock, and the court requires the shipping company to compensate the dockowner for these damages. (Variant of 1 and 1a: Imagine that negotiation between hiker/ship’s captain and property owner is possible, perhaps by cell phone, prior to the unconsented to use of the property. If the owner does not consent, is use of the property wrong? Suppose the owner offers to allow his property to be used provided all of the gain the hiker/ship’s captain would gain from the use except for one dollar is to be the price paid to the landowner to the sue. Should the owner have the right to deny use of his
property, in such a thin market situation (few buyers, few sellers), unless the terms he sets are agreed to?

2. Pollution; holdout bargaining. A would-be manufacturer can start a business in a valley that will be very productive generating benefits for many valley residents. The profit from the factory will be $1,000,000 per year. Unfortunately there is no way to carry on the manufacturing enterprise without releasing a small amount of irritating pollution, which will cost each of the one million residents of the valley 10 cents worth of damage per year. Suppose the technology for negotiating is such that if the manufacturer must obtain actual consent from each of the residents, the enterprise cannot go forward. But he is willing to contribute to the maintenance of valley parks such that each resident is benefited in the amount of ten cents per year, so no resident on balance is made worse off by the operation of the manufacturing plant. Should Lockean theory forbid the manufacturer from carrying on his enterprise on the terms described? Variant: Suppose one person in the valley is unwilling to give permission to be polluted on and suffer ten cents worth of damage per year unless he is given $600,000 per year—the lion’s share of the company’s yearly profit per year. The other 999,999 valley residents have signed a petition indicating they consent to the start-up of the firm provided its polluting activities are compensated by yearly park maintenance contributions. Question: Should the Lockean moral rights of the polluted upon holdout bargainer be construed as giving him the right to block the project unless his actual consent is obtained?

3. Easy rescue; bargaining. Smith is drowning in the bay. Jones happens by in his speedboat. He offers to throw Smith a rope and save his life, provided Smith pays Jones all of his life savings. The rescue is risk-free and virtually costless for Jones. Smith is better off accepting Jones’s offer than refusing to accept the offer, in which case, he drowns.

4. Accommodation. Smith is fleeing from villainous aggressor. He will soon be overtaken by villainous aggressor and killed. He has one chance to save his life. Above him is a perch in rocks. Jones is standing in the perch; let is be assumed that Jones has a perfect right to be at that spot; perhaps he is the owner of the perch. Jones sees and appreciates the situation, which includes this feature: If Jones steps to the back of the perch to accommodate Smith, then there will be room for both of them. Smith can leap to the perch, and the villainous aggressor, being heavy, cannot get to the perch and cannot menace anybody further. If Jones does not step back to accommodate Smith, then Smith could still leap up to the perch and save himself, but he would then dislodge Jones from the perch, and Jones would fall to his death. Jones does not step back. Is it permissible in these circumstances for Smith to escape from villainous aggressor by leaping up to the perch, dislodging Jones and killing him?

5. Easy rescue with reversal of roles. Smith is drowning and has just lapsed into unconsciousness. Jones happens by in her leaky rowboat. Jones pulls Smith into her boat, saving her life, without thinking of consequences. This creates a problem. The added weight of the extra body in the boat causes it to spring a leak. Unless both Smith and Jones bail water, the boat will sink, and Jones, a nonswimmer, will drown. Smith has
by now revived, and would not mind talking another swim, so if the boat now sinks, he
would not be endangered or inconvenienced. Note that Smith made no pledges of any
kind when Jones pulled him from the water—he was unconscious. Would Smith be
within his Lockean rights to decline to aid Jones, the now imperiled rescuer, by bailing
water to keep the rowboat afloat? One might think that it would not be nice for Smith to
decline to aid Jones but he would be within his rights to fail to provide lifesaving aid. O
one might deny this. One might consider whether one thinks Smith in the example as
described is under an enforceable duty to rescue. If the duty was enforceable, then it
would presumably be acceptable for a third party, seeing the situation, and unable to
intervene except by threat, to threaten to shoot Smith unless he bails water in the way
necessary to save Jones’s life. Would issuing such a threat in these circumstances be
permissible or a violation of Smith’s moral rights?

6. Absolutely harmless trespassing. Suppose Smith trespasses on Jones’s property. For
example, he enters Jones’s house without permission, walking past a NO
TRESPASSING! DON’T ENTER!! sign. He wears a hygienic mask, and wears shoes
that do absolutely no damage to Jones’s floors. He leaves everything undisturbed.
Suppose Jones never hears what happens and so suffers no anxiety or unease, no
psychological cost caused by the trespass. So Jones suffers no harm of any sort, even
very minor harm, as a result of the trespass. Still, Jones’s property right is the right to
dispose of his property and to not suffer unconsented to trespass. One might hold that
even if the trespass has not caused any harm to Smith, it has wrongly deprived him of
freedom to dispose of his property as he wishes—to control who enters and uses his
property and how. So should Lockean rights be interpreted so that in this example we
should say Smith has violated Jones’s private property right? Or should we discern no
Lockean rights violation here?

7. Peter Railton example of pure risk imposition. Smith operates a nuclear reactor in his
basement just for fun. If all goes well, no harm of any sort will come to his neighbors,
and no damage to their property of any sort will come about. If all does not go well, a
big explosion will cause mayhem. You might vary the case by varying the probability
that the probability that an explosion will occur, on any day the reactor is running.
Question: Granted that if an explosion occurs, Smith will have wrongfully harmed his
neighbors, violating their rights, what do we say if (1) it is unknown whether the risk
Smith is imposing on his neighbors will issue in actual harm (though the probabilities
can be estimated) or (2) after the fact, we see that in this case, Smith did not actually
cause any damage to neighbors. Does one have a Lockean moral right not to have
serious risk of being blown to bits by one’s neighbor in this sort of way imposed on one?
Does one have a Lockean right not to be harmed that is legitimately enforceable, so that it
is OK to coerce Smith to cease his basement operation?

8. Summers v. Tice (California, 1948). A California tort law case. Summers, Tice, and
Simonson go hunting. A quail is flushed, and Tice and Simonson both negligently in the
direction of Summers, who was struck in the eye by a shotgun pellet. Both Tice and
Simonson were using the same kind of gun and shot, so it as impossible to determine
from which gun the pellet that actually caused harm to Summers (though clear that the
pellet came from one gun or the other). Summers sues for damages. Under traditional tort law, to establish a valid claim one must show (a) one suffered a loss, (b) the action or omission of person you are suing caused the loss, and (c) the person you are suing was at fault in so acting or omitting (she was under a duty of care which she violated). (A fourth condition sometimes limits liability to harm that was foreseeable by the defendant; there are variants of this doctrine.) Neither Tice nor Simonson on the facts described is more than .5 likely to have caused Summers’s injury. Should Summers have won his case? Would it be unfair or wrong for the law to stipulate that even if it became known which defendant actually caused the harm, the faulty risk-imposing conduct—regardless of whether or not this conduct actually causes harm—suffices to trigger liability for damages? (We might envisage people who negligently or recklessly engage in conduct that imposes wrongful risk of harm on others being made to pay in proportionate to their fault into a fund that compensates victims of such risk imposition. The imagined revision of the law severs causation and liability).

****

Possible revision of Nozick: In a footnote on page 30 of *Anarchy, State, and Utopia*, Nozick sets to the side the question, should rights be overridden in the face of moral catastrophe (e.g., would it be permissible to cause uncompensable damage to one innocent person who does not consent to be harmed, in order to prevent an outcome such as a Nazi victory in World War II (and Nazi domination of the earth for a very long time). An absolutist about rights holds they should never be violated whatever the consequences. A quasi-absolutist holds rights should never be violated except to avert major moral catastrophe. A moderate Lockean holds that rights may be violated (One may permissibly act against the right, do what it forbids), provided the ratio of the harm that would be suffered by the rightholder if the right is violated to the net harm that would be suffered by nonrightholders if the right is not violated does not exceed a threshold. (The Lockean is more or less moderate, depending on where she sets the threshold.) This statement of moderate Lockeanism modifies a suggestion originally made by Judith Thomson. Moderate Lockeanism yields the result that one’s right not to have one’s extra shirt button stolen is less stringent—less benefit from the theft to others is needed to warrant violation of the right—than one’s right not to be tortured and killed just for fun. Moderate Lockeanism also seems to dissolve the Lockean prohibition against paternalism. (If Arneson has a right to use recreational drugs, but overriding this right, and forbidding Arneson to use cocaine, would make his life go better, then he suffers no loss, and the threshold for acceptable violation will be met if there is just a penny’s worth of gain to nonrightholders in the offing. Or is there some mistake in this line of thought?) The question arises whether moderate Lockeanism develops Nozick’s libertarianism in a plausible direction or guts its core.