

BLACKBOARD NOTES ON NOZICK VERSUS SEN PHILOSOPHY 13
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ROBERT NOZICK ON RIGHTS AS SIDE CONSTRAINTS. Moral rights should be conceived as side constraints on actions not as goals to be promoted. We ought always to respect rights (that is, refrain from violating them ourselves), not act to maximize their overall fulfillment. On the side constraint view, a right should enter the determination of what one morally ought to do in this way: Of the acts one could do at a given time, eliminate from consideration the acts that would violate anyone's rights. These are ineligible for choice. You may choose any remaining act. If instead we conceive of rights as goals to be promoted, we end up in the position Nozick calls "utilitarianism of rights." This would be to misconceive the nature of rights and the role they should play in the determination of what we morally ought to do.

AMARTYA SEN ON RIGHTS. **Sections 1 and 2 of this essay** present counterexamples against "welfarist consequentialism" and "constraint-based deontology." The latter is Nozick's view: moral rights should be interpreted only as side constraints on what one may legitimately choose to do.

Welfarist consequentialism is act consequentialism plus the further claim that nothing affects the value of consequences except (a) the sum total of utility or welfare they contain and (b) the distribution of utility or welfare across persons. Act consequentialism is the view that one morally ought always to do an act whose outcome is no worse than the outcome that would result from anything else one might instead have done. By "utility" or alternatively "welfare" Sen means to refer to good interpreted either as desire satisfaction or pleasure and the absence of pain. The welfarist consequentialist then holds that one morally ought always to do an act whose consequences in terms of utility (how much there is and perhaps how it is spread across persons) are no worse than the utility consequences of any other act one might have done instead. Welfarist consequentialism is a family of views that includes "Maximize aggregate utility!," "Maximin utility (make the utility level of the worst off person as high as possible)!," "Equalize utility!," and "Prioritize utility (Maximize a function of utility that values more utility overall rather than less and also gives extra weight to a utility gain for a person, the worse off she would be otherwise)!."

Against constraint-based deontology, Sen urges that moral rights should be regarded, at least to some extent, as goals to be promoted and not merely as side constraints to be respected. Rights, after all, vary in importance, from the momentous to the utterly trivial. I have a right that you not steal the extra button on my shirt and also a right that you not torture and kill me just for fun. These are not on a par.

Example: If A is about to rape B, and the only way that C can prevent this rape from occurring involves C's temporarily stealing D's car, C morally ought to violate D's little right in order to prevent the violation of B's far more important right.

Against welfarist consequentialism, Sen urges that there are things that matter morally to us, and should matter morally to us, other than utility and its distribution. For example, rights matter intrinsically, not just as means to achieving utility gains.

Sen's double counterexample: Donna and the Bashers (see Sen for details). This is supposed to be a counterexample both against welfarist consequentialism and against constraint-based deontology. From the welfarist consequentialist standpoint, if a sufficiently large number of people would gain a sufficiently large amount of utility from inflicting physical assault on an innocent nonthreatening person or in other words bashing him, then morally one ought to bring it about that the bashing is done rather than not done. Sen demurs.

Suppose one agrees and thinks that rights trump utility sometimes or always and certainly in this sort of case. From a constraint-based deontology standpoint, morality says one should not

violate rights. This means Donna should not violate Charles's little right to privacy even though in her circumstances this is the only way that she could prevent the violation of Ali's morally more important right not to be bashed. Again, Sen demurs. Rights should be included in the evaluation of consequences and the calculation of consequences including rights consequences should play a role in fixing what it is right to do. In this case, Donna should violate Charles's right in order to prevent a more important rights violation thus securing more rights fulfillment overall.

Digression on moral methodology In Section 3 of his essay Sen considers the argumentative force of hypothetical or contrary to fact examples in moral theory. Why do unreal examples make any difference to what we ought to do in real-world decision making?

Sen in effect notes that moral principles are laws, they say what must be done. If we think people have rights to private property, this judgment involves commitment to judgments about nonactual circumstances, such as that if I had left the keys to my car in the ignition last night, pedestrians passing by ought not to have taken my car for a joy ride without my consent. Our principles might be qualified (and for example not assert an absolute right to private property come what may, in any circumstances), but then our qualified principles hold always—being principles, their scope is universal. If we can frame a thought experiment in which our qualified principle would require doing X but we cannot believe that doing X in those imaginary circumstances would really be right, then we cannot affirm our qualified principle as correct.

Real-life examples are usually messy and complex. Thinking through them is a complex matter. So in moral theory, we often find it useful to use simple toy examples, that are more tractable to analysis and judgment. However, when an example is posed, and we have a reaction to the example, it is not always easy to see what feature of the example is determining our reaction. To clarify what is going on, it is useful to consider an array of examples, in which various features are systematically varied. Thinking about the whole array of examples, we try to work through our reactions, to find principles or general rule that yield acceptable implications for conduct and policy in all of the cases. (In this process we are seeking what John Rawls calls ideal reflective equilibrium.)

Section 4, goal rights systems and rights as rights to capabilities. Sen's next point is that we should conceive of rights as rights to capabilities rather than as rights to be treated by another person or persons in one or another way. Why so?

Here's a simple example to illustrate his claim: In a variant of the Donna and the Bashers story, suppose that Ali is threatened by a landslide that will strike the construction site he is scheduled to visit this afternoon. (Donna is a seismologist and knows this.) If hit by this landslide he will be injured exactly to the same extent as he would have been injured had he been bashed. Donna can prevent the landslide from harming Ali only if she breaks into Charles's office and goes through his files in ways that would violate his right to privacy. Suppose Donna agrees that rights can sometimes trump utility and certainly should do so in this sort of case. However, in the example as described, the only right at stake is Charles's right to privacy. So, if we think of rights as rights to be treated in certain ways by others, then Donna should refrain from breaking into Charles's office, thus respecting his right to privacy and securing more overall rights fulfillment. Sen thinks this result shows something is wrong with the premises that led to it. Sen thinks that roughly the same reasons that say Donna should break into Charles's office in the original example also say she should break in in the landslide variation (I have simplified Sen's actual presentation of the case). Sen proposes what is important here is Ali's right to move about the city freely without injury, which is threatened by the landslide just as much as by the bashing. Generalizing from the example, we should view rights as rights to capability to function in significant ways. Rights then are always rights to real freedom. What should matter to us is the extent of the substantive, not merely formal freedom that people have. (I am formally free to go to Paris if no law forbids me and no one interferes with my going. I have the substantive or real freedom to go to Paris if there is a course of action I can take, such that if I choose that action, I get to Paris.)

In a goal rights system, rights are sometimes goals to be promoted. The answer to the question, what contribution would some act (that the agent might do) make to overall rights fulfillment, sometimes affects whether it is right or wrong to do the act in question. Versions of consequentialism are members of the goal rights family of views, but not all such views are fully consequentialist. Sen's argument against Nozick does not commit Sen to taking a stand for or against consequentialism.

Criticisms of Sen on rights.

Rejoinders from the broadly utilitarian camp.

(1) Perfectionism. The utilitarian who favors J. S. Mill's version of the doctrine might say that in the Donna and the Bashers example, the sadistic pleasure the Bashers would get from bashing Ali qualifies as a very low-grade pleasure, which should have little or no positive weight in the scales when one calculates what act would maximize aggregate human pleasure. Sen interprets utility as pleasure or desire satisfaction but it is better to view utility as the attainment of objectively valuable goods, having which genuinely makes one's life go better.

This response invites the construction of a new version of Sen's example of Donna and the Bashers. In the new version, the Bashers have no sadistic desires. Unfortunately the only way that they will be enabled to attend a wonderful once-in-a-lifetime opera performance is to get some cash fast and the only way to do that, unfortunately, is to bash Ali and take his wallet. In this version of the example, the Bashers get high quality pleasure, an objectively valuable and excellent aesthetic experience, from bashing Ali. Perhaps this version of the example is not so convincing a counterexample against the utility-based views as Sen's original case.

(2) Capability might be only instrumentally, not intrinsically valuable. What ultimately justifies Sen-type rights if not the genuine improvements in quality of life that protection of rights makes possible for individuals? Consider cases in which we can protect significant capability rights, but we know for certain that the freedom thereby made available to the individual will be wasted, not exercised to improve the quality of the agent's life or anyone else's either. In such cases, why make a fetish of rights to capability? Why care about them? Consider this example: Donna faces a decision just like the original Donna and the Bashers example described by Sen, but with this difference: Ali is on his way to punishment therapy. In the course of his therapy session, he will voluntarily consent to be bashed, and will suffer physical hurt and injury just as bad as what he would have undergone if he has been subjected to a bashing against his will at the hands of the Bashers. One might say that we care about real freedom only because and insofar as real freedom for people promotes their well-being over the long run. Real freedom is a very important means to what really matters, which is the actual quality of life that persons have.

Rejoinders from the constraint-based deontology camp.

(1) Compensable and noncompensable rights. An advocate of a Nozick-type view might allow that on a constraint-based view, it should be allowed that sometimes it is morally acceptable to do what a right taken at face value forbids provided that one fully compensates all victims of rights violation fully for any damages suffered. On this view, in the rape example, C should take D's car but then compensate D for the unconsented to loss. If she does not compensate, she does wrong. Some rights violations might be noncompensable. For example, if we violate Smith's rights by slitting his throat, there may be no way we can compensate him for the loss he suffers due to this rights violation. But then we should not violate Smith's noncompensable right even for the supposed greater good.

(2) The advocate of the side constraint conception of moral rights might also wonder how Sen's example of Donna and the Bashers is supposed to generalize. What is the general rule which we are being asked to embrace? In Sen's particular example, Donna has the choice of doing nothing, in which case one person suffers a big rights violation at the hands of another, or to violate a small right of one person herself, in which case the big rights violation is averted. Are we then supposed to do whatever maximizes the weighted sum of rights fulfillment (equivalently,

minimizes the weighted sum of rights violations)? Suppose in another case Donna could either herself violate a big right of one person (say the right not to be deliberately tortured and killed provided that one is innocent of wrongdoing) and thereby bring it about that billions and billions of utterly trivial rights are fulfilled, or refrain from violating a big right of one person, as just specified, in which case billions and billions of utterly trivial rights of people all around the universe are violated. The weighted sum of rights fulfillment is greater, by a whisker, if Donna violates the big right and thereby prevents all of the tiny rights violations than if she refrains from perpetrating the big rights violation and thereby allows the billions of tiny rights violations to occur. So taking rights as goals to be promoted seems to yield the recommendation that in this case, Donna should torture and kill for the greater good. The Nozickian would demur. Looking at a wide range of cases, the Nozickian may hold that all things considered, the pure side constraints way of conceiving rights is best.

(3). Rights as correlative with duties. The advocate of the view that rights are always rights to be treated in one way or another by some specific other person or persons (call this the "specific duties conception") might also find Sen's capability rights idea problematic. The problem is that on Sen's view that all rights are really rights to capability, rights may come to resemble what Feinberg calls manifesto rights.

Suppose we hold that the content of a right is constituted by the duties that people other than the rightholder are under, corresponding to this right. My right to free speech is constituted by the duties of other people not to interfere with my speech in certain ways. A claim that Smith has a right is not discussable until we are told exactly what duties are supposed to be correlative to the claimed right.

But Sen's capability rights seem to be inherently vague and in many cases indeterminate along this dimension. Consider Ali's supposed capability right to move around the city freely (which is equally threatened by rights violating acts of others and by a rockslide or other natural occurrence). What duties are other people under, corresponding to this right? Does every capability right correspond to a duty on the part of all people everywhere to bring it about that the person who has the capability right has the capability? Or what?

The problem is not merely that the assertion of a capability right seems to trigger duties that fall on a huge number of people. Perfectly unproblematic rights may share that feature. Smith's private property right over her party dress corresponds to duties imposed on everybody everywhere not to steal the dress, touch it, use it, etc. without Smith's consent. But here we know what duties we are talking about, and ascribing to everyone, when we assert a private ownership right. In the case of Senian capability rights, the correlative duties are maybe not so clear or determinate.

(4). Inviolability, maybe? Nozick asserts that the side constraints view of rights reflects the principle that individuals are not merely means, tools to be used by others even for worthy purposes. A system of rights understood as side constraints gives everyone a status of inviolability (or inviolability up to a point, if rights are not regarded as absolutely binding exceptionless constraints). A goal rights system would have it that one may have a right to X yet that right should not always be respected (it is OK to violate the right in order to minimize overall violations). In such a system, no one is inviolable. Going beyond Nozick, some have urged that a system of rights in which all have the status of inviolability confers a status of inviolability on everyone that itself generates value. However, this fact is counterbalanced by the fact that in a system of rights as goals, everyone can be viewed as having the status of unignorability (one may not ignore someone's loss of a right just because the only way to prevent or remedy the loss involves violation of someone's lesser right). To ask whether the status of inviolability is better than the status of unignorability just raises again the question we started with, whether the rights as side constraints or rights as goals approach is better.

(5) Nozick adds that when one person's right is violated to aid others, "there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives." I am not sure how this is supposed to meet the claim that however bad (for example) a rape is, two rapes are worse than one.

(6) What are side constraints based upon? Nozick asks, what qualities must a being possess if it is to be reasonably viewed as having Lockean rights? (By "Lockean rights" Nozick means the spare conception of rights that he favors—roughly, one has the basic right to live as one chooses so long as one does not harm others in certain determinate ways, force, fraud, theft, physical violence, and so on? If humans have Lockean natural rights that other nonhuman animals either lack or possess to a lesser extent, what is it about humans that makes the difference? Nozick thinks that the traits that roughly make the difference are rationality, free will, and moral agency. Less roughly, what gives a being Lockean rights is the ability "to formulate long-term plans for its life," the ability "to consider and decide on the basis of abstract principles or considerations it formulates to itself," and the ability to limit "its own behavior in accordance with some principles or picture it has of what an appropriate life is for itself and others" (p. 49). Such a being has a capacity for meaningful life. Nozick states his hunch that we might be able to argue from the capacity for a meaningful life to possession of Lockean natural rights, but he does not try to formulate an argument. Sen would say that lack of positive freedom, substantive freedom, limits people's capacity to have meaningful life, and note that having one's Lockean rights protected does not guarantee that one will have any of the wherewithal to fashion a minimally satisfying life.