

ROBERT NOZICK ON RIGHTS AS SIDE CONSTRAINTS

The notion of a natural moral right. Rights might be waivable or nonwaivable, forfeitable or nonforfeitable, alienable or inalienable. A right that is alienable can be transferred from the bearer to another person by the voluntary act of the right-bearer. An inalienable right cannot be so transferred. A right that is forfeitable can be forfeited by wrong action on the part of the right-bearer. For example, I have a right to liberty that includes a right not to be placed in prison against my will, but there are acts I might perform such as violent assault that would forfeit this right to liberty and render my imprisonment morally acceptable. A right is waivable if the right-bearer can at will permit another person or persons to do what the right forbids. For example, if I can waive my right to life, say by requesting that my doctor end my cancer pain by killing me, then I can allow or authorize my doctor to kill me, and in that case he does not violate my right to life if he kills me. According to Robert Nozick's Lockean conception of rights, they are alienable, waivable, and forfeitable.

On the Lockean view, individuals have natural moral rights--rights that are independent of social arrangements and conventional understandings in a given society. All (adult) persons have these rights. Here is a rough summary of their content: (1) each person has the right to be left free to act as she chooses with whatever she legitimately owns so long as she does not harm nonconsenting other persons in certain ways including force, fraud, violence, theft, extortion, breach of contract, and physically causing damage to persons or their property; (2) Each person is the full rightful owner of herself (or himself); (3) each person has the right not to be harmed by others in certain ways (see 1) unless she consents to be impinged on by them. (There are complications to the "physically causing damage" proviso; see chapter 4.)

Rights on the Lockean view give the right-bearer significant choice and control with respect to the matters the right regulates. If you have a right not to be touched, then others should not touch you unless you consent, but if you consent, it is OK.

In general, what is a right? It is a claim that should be honored. Can we say more? There are rival views. One view is that one has a right to X when one's interest in X justifies others being under a duty to accord one X. For example, if I have a right not to be assaulted, then every other person is under a duty not to assault me. Rights ground duties. For any right, one can clarify its content by specifying the duties that it implies other people have toward the right-bearer.

Rights are legitimately enforceable. If you have a right to X, and someone threatens to violate it, then you generally may legitimately use force against the threatening person to prevent the violation of your right or to punish the offender if a violation occurs. (This right to enforce is subject to due proportionality limit:

If you are about to steal my bubble gum that I have left on the ground and the only way I can stop you is by killing you with my bazooka, I must let you violate my right, though you are wrong to violate.)

In chapter 3 of *Anarchy, State, and Utopia*, Nozick quickly touches on many issues concerning the nature of Lockean natural rights.

The minimal state and the ultraminimal state. In Part I, Nozick argues against the libertarian anarchist that a minimal state or an entity tantamount to a minimal state could arise from a state of nature by a process that violates no one's Lockean rights. A minimal state is one that limits its function to protecting people's Lockean rights. In a state of nature, given that some would aggress against others, people would act to protect themselves against aggression, by forming mutual aid societies and eventually by becoming customers of firms that sell protection services (protection agencies). Given the nature of the good, on a territory there would tend to be a single dominant protective agency (DPA). But given that on this territory some people might well choose not to be customers of the DPA, it seems the DPA would not be a state. This would be so, it appears, because the DPA unlike a genuine state (1) would not extend protection to all inhabitants of its territory and (2) could not legitimately claim a monopoly on the use of force within its territory. Nozick argues that these appearances are deceptive.

Imagine an entity that claims a monopoly over the use of force on a compact territory but does not protect all inhabitants of the territory but only its paying customers. Call this entity the ultraminimal state. In contrast, the minimal state besides claiming a monopoly over the use of force on its territory also extends protection to all inhabitants of this territory. Nozick notes that some might think the proponent of the ultraminimal state is inconsistent: "Since he accords paramount importance to the protection and nonviolation of rights, how can he support the ultraminimal state, which would seem to leave some persons' rights unprotected or illprotected?" (pp. 27-28)

But Nozick notices that this question assumes that a concern for moral rights must function as a moral goal. This is not so. The ordinary understanding of rights sees them as side constraints to be respected not goals to be promoted. On the side constraint view, a right enters practical deliberation in this way: An agent deciding what to do, facing an array of possible acts he might choose, should eliminate from the eligible set of possible acts those that violate anyone's moral rights. Within the constraints of rights, each person is free to choose as she likes. The imperative associated with rights is: Respect Rights! This imperative instructs each person that she should not violate anyone's rights. The alternative is to regard rights as goals to be promoted, perhaps by themselves, perhaps along with other moral goals. The imperative of rights on this approach is: Minimize the violation of rights! This alternative Nozick calls "utilitarianism of

rights." According to Nozick it is wrong for roughly the reason that utilitarianism is wrong.

Sen on rights. In "Rights and Agency" Amartya Sen defends the rights as goals approach against the side constraint view of rights. Sen tells a story that he presents as a counterexample to both (a) the view that morality consists entirely in maximizing some function of utility and (b) the view that rights are side constraints that each person must respect, not goals to be fulfilled. In the story, Ali, a shopkeeper, is threatened by a gang of thugs, the Bashers. They plan to waylay Ali this afternoon and assault (bash) him. Donna can prevent the bashing of Ali, but as it happens, only by breaking into the office of Ali's therapist Charles, violating Charles's right to privacy. If she breaks in, she violates a small right (Charles's right to privacy) but is enabled to warn Ali and prevent a larger, more serious rights violation (Ali's right not to be bashed). Moreover, it turns out that when she calculates utility gains and losses, the utility the ten Bashers would get from bashing Ali exceeds the gain he would get by avoiding the bashing, and the bashers initially are worse off in utility terms than Ali, so a variety of utility-based principles (Maximize total utility, maximize average utility, prioritize utility, maximin utility, leximin utility, maximax utility, equalize utility, and equalize at the highest possible level) would all deliver the verdict that it is better if Ali gets bashed. To reach the verdict that it is bad if Ali is bashed and that she ought to act to prevent this bashing if she can, Donna must judge that at least in this case, rights trump or take priority over utility. Furthermore, to reach the conclusion that she ought to violate Charles's little right in order to prevent other people from violating Ali's big right, she must treat rights as goals to be promoted not as side constraints to be respected. Sen thinks that when we reflect on the example we will see that the side constraint view is deeply problematic.

Sen considers some variations on the Donna and the Bashers example. Their import, roughly, is that according to Sen it should not matter to us whether what threatens Ali is a rights violation by humans or a force of nature threatening equivalent harm. Suppose Donna could prevent Ali from being hit by a rockslide that would impose the same harm as a bashing if she violates Charles's right to privacy to discover Ali's whereabouts that afternoon. If all rights are rights not to be harmed or to have one's liberty restricted by other persons, then Ali has no right that can weigh in the balance against Charles's right to privacy, and in the variant example Donna should not violate Charles's right to prevent serious harm to Ali. This seems wrong, to Sen. Sen proposes that what is important here is Ali's right to move about the city freely without injury, which the rockslide threatens just as much as the bashing. Generalizing from the example, we should view rights as rights to capability to function in significant ways. Rights then are rights to positive 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 it and no one interferes with my going. Having formal freedom is compatible with not being able actually to go to Paris, because I lack means. I have the substantive or effective 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. Since Lockean rights do not guarantee the right-bearer substantive freedom, Sen thinks it is better to frame our ethics in terms of rights to capabilities. For more on this theme, see Sen, "Equality of capacity," in Sher and Brody reader.)

Criticisms of Sen. The utilitarian might respond that 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. Also, 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?

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.

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.

Nozick also suggests an argument from the side constraint view to specifically libertarian constraints: the form of morality includes side constraints, the best explanation of morality's having this form is the distinctness and separateness of individuals, and from this separateness of persons the libertarian constraints follow. This argument, whatever its worth, starts from the idea that rights are better viewed as side constraints, so cannot support that claim.

Further complications. Nozick notes that one's right not to be harmed must be qualified beyond the qualification that one may forfeit one's immunity to assault by aggressing against others. Given that one may use force against those who are deliberately aggressing against one or unintentionally but negligently threatening one's security, may one use force against nonculpable threats (persons who threaten harm to others without being morally blameworthy for doing so) or innocent threats (those who threaten harm to others without themselves acting in any way to pose this risk of harm) or innocent shields of aggressive threats (those who are placed in the line of fire between an aggressive threat and a wrongfully threatened person who seeks to use self-defensive violence against the threat)? Consider also bystanders blocking escape from aggression: suppose I am fleeing aggressive attack, and can escape by jumping on a bridge, if a bystander now on the bridge will step back to give me room. If he does not step back, I can still jump, and save myself from lethal attack by the aggressor, but my landing on the bridge will cause the unhelpful bystander to fall off the bridge to his death. If I do not jump on the bridge, I will be killed by the aggressor. The bystander see me but does not step back to make room for me. In these circumstances, do I have the right to save myself by jumping and killing the unhelpful bystander? Nozick also mentions that a natural rights view needs to consider carefully what rights (if any) nonhuman animals with varying cognitive abilities have.

The experience machine. Does nothing matter to us except the quality of our felt experience--how things feel from the inside as one goes through life? Nozick imagines a science-fiction machine that would enable people to have the artificial experience of any sort of life one might want (one is plugged into electrodes stimulating one's brain to give the desired experience). Is the good life plugging into the experience machine if we could get such a thing? If not, why not? Nozick suggests that for most of, there are things that matter to us other than the quality of our experience. From this standpoint it would be reasonable to deny that life on the experience machine would be a good human life for the person who lives it. So perhaps moral principles should register values beyond value that arises from the quality of our experience.

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? 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.

From the ultraminimal state to the minimal state. In chapters 4 and 5 Nozick completes his argument to the conclusion that something close to a minimal state, whose function is limited to protecting people's Lockean rights, could arise from anarchy by a process that violates no one's Lockean rights. In a nutshell, the account goes like this. The DPA on a territory that contains independents who are not customers of the DPA but want to use self-help methods to protect their rights will reasonably be alarmed by the prospect of self-help rights enforcement. If the DPA judges that the independents are unreasonably imposing risks on its customers by using force against them when conflicts arise, the DPA might be reasonable or unreasonable in this judgment. Even if the DPA is reasonable, the independents or some of them might be reasonable to claim their right to self-help enforcement of their rights and defend this right against the DPA. But the DPA will predictably win battles with independents. In the end the DPA successfully claims a monopoly on the legitimate use of force on its territory. But this will leave the independents helpless to enforce their rights. In general, Nozick claims, when one coerces someone to prevent him from behaving toward you in a way you regard as unduly risky (but which might not harm you at all), given that the person has a legitimate reason to engage in this risk-imposing behavior that does not involve the desire to impose risks on you, if the person blocked from action suffers disadvantage (not merely loss of utility) that pushes her below some minimal acceptable threshold, the coercer morally must provide compensation for this disadvantage (not full compensation) to the coerced person. The coercion by the DPA of independents using self-help enforcement methods deemed unduly risky by the DPA is an instance of this general scheme according to which coercion in such cases generates the obligation to provide compensation for disadvantage. In the case of the DPA that prohibits independents from engaging in self-help enforcement of rights, the most cost-effective compensation would be a protection package. So the DPA after all protects all those who inhabit its territory, not just paying customers, and must do so if it is to be morally legitimate. Nozick concludes that since the DPA that arises from the state of nature might come to be state-like (it claims a monopoly on the use of force and protects all who inhabit its territory) without violating anyone's rights, the argument against the libertarian anarchist is successful. The minimal state is justified.

The question arises whether Nozick's hypothetical account of how something close to a minimal state might arise by a process that does not violate Lockean rights qualifies as a rebuttal of the libertarian anarchist. Are the libertarian anarchist's strongest grounds for holding all states to be morally illegitimate touched by Nozick's argument?

Another question arises about Nozick's elaborate argument in chapters 4 and 5. One might claim that if an entity provides important and uncontroversially beneficial public goods for all members of a group, the entity can legitimately maintain a coercive scheme to extract fair payment for these public good services from all who benefit from the scheme. To support this claim one might appeal to the Principle of Fairness: "when a number of persons engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission" (chapter 5, p. 95). (A good is public with respect to the members of a group to the extent that (1) consumption of the good is nonrival, (2) exclusion of any member of the group from consumption of the good is either impossible or unfeasible, and (3) all members of the good must consume the same amount of it.) Nozick has an interesting argument to the conclusion that the Principle of Fairness does not give rise to obligations that may be enforced against free riders on the cooperative scheme. Question: Is this argument sound?