

Nozick, chapter 4, Anarchy, State, and Utopia For Theories of Justice

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In this chapter Nozick takes up the issue, what a natural rights position should say about actions that pose risk of rights violation. Also, though this theme is less prominent, there is the question what a natural rights position should say about an act that deliberately violates a right versus an act that aims at some other morally innocent goal but violates a right as a side effect.

If killing me is wrong, is it wrong to perform an act that imposes some risk of bringing it about that I am killed?

If deliberately attacking me is wrong, is it wrong also to engage in an attack that as a side effect physically harms me?

We are investigating the shape of a natural rights position. We have some clear intuitions about natural rights, but these do not settle all issues that naturally arise. Our investigation will clarify and specify the exact content of natural rights.

Given this aim, we need a neutral terminology for talking about acts that might or might not be wrongful violations of rights. We can distinguish the acts that infringe a right, do what the right literally forbids but might or might not be allowable all things considered, and acts that violate a right. Violations are the infringements that are wrongful, forbidden all things considered. Example: perhaps my taking your car without your permission to drive my brother to the hospital infringes your right to undisturbed possession of your car, but provided I pay full compensation to you, the combined unpermitted taking plus compensation is not wrongful, not forbidden, not a violation.

In Nozick's terminology, rights draw a moral boundary around an individual, but some crossings of this moral boundary may not be forbidden. The problem is to specify principles that fix what boundary crossings are forbidden and what ones are not forbidden.

Objection: If an act crosses the boundary of a right, it's got to be a violation, and wrongful, forbidden.

Response: You can define "boundary" that way, but the substantive question remains open. Where is this boundary located?

Nozick, page 59, raises two questions:

1. Why forbid any action, including any boundary crossing, provided all victims are fully compensated?
2. Why not prohibit all moral boundary crossings "that the party impinged upon did not first consent to"?

Comment: If we said all actions infringing rights are OK provided compensation is paid, in effect what an individual has a right to, what she is entitled to, what it is wrong for her not to get, is not what is identified as what she has a right to but the utility she would get from that. If I have a right to a car, or my arm, what I am really entitled to, on this view, is the utility I would get by continued possession of my car, or my arm. This is at least odd.

Nozick on question 1. Reasons NOT to allow any boundary crossing, provided compensation is made.

1. Fair division of the benefits of exchange.
2. Some boundary-crossing acts provoke generalized fear.

P. 71: "[A] system permitting boundary crossing, provided compensation is paid, embodies the use of persons as means; knowing they are being so used, and that their plans and expectations are liable to being thwarted arbitrarily, is a cost to people; some injuries may not be compensable; and for those that are compensable, how can an agent know that the actual compensation payment won't be beyond his means?."

Let's look at these reasons.

Fair division: If you can take my car and just pay me full compensation, you have no incentive to deal with me and get voluntary consent to a sale. Why is that fair? Fairness does not seem to capture the real worry

here. If you take my car and pay me compensation, I can take it back, and just pay compensation to you, and anyone else can take it from you. Presumably I got it from someone in a context where, if sale occurred, sale price reflected the possibility of preempting sale by taking. Everybody is being treated on the same terms.

Suppose we ask: Does full compensation include compensating me for what I would have received, by selling the car to Smith, if you had not taken it first? No, because why would Smith purchase rather than take and compensate? Notice on this system, goods go to those who value them most. If you value the car at \$1000, and no one else values it that high, then no one will benefit by taking the car from you and paying you compensation. But the system seems to put a lot of strain on people's honest reporting of their true reservation prices for goods. The system generates perverse incentives--I do better if I lie about the true valuation I place on my goods, in many circumstances.

Some acts generate general fear. Isn't such fear strictly unreasonable? If I know I will be fully compensated if you cut off my arm, why should I fear your cutting off my arm? Why should the structure of a natural rights position, that specifies people's fundamental entitlements, be determined by unreasonable proclivities to emotional responses of various sorts? Also, we might wonder what would follow if the emotion generated were positive rather than negative. What if people were (unreasonably) gleeful about the possibility that they might suffer an auto accident and be fully compensated for damages? Would we then say, it's fine to crash into people's cars provided compensation is paid? Is the underlying consideration here utility-maximizing? This seems an odd underlying structure for a natural rights view.

Embodying the use of others as means: Why should this be problematic? The moral prohibition attaches to being used as a mere means. One is used as a mere means if one is used in a way that violates moral principle.

Knowing one is liable to be used in this way is a cost to people: This is the fear consideration restated in other words.

Some injuries may not be compensable: This is irrelevant if the issue is, should we allow any boundary crossing provided full compensation is paid. On this principle, uncompensable boundary crossings are not allowed.

How does one know the boundary crosser will pay compensation? One could require security by various means--payment in advance, posting large bonds, etc. This is a practical issue. Suppose these practical costs of administering a take and pay system were "too large," then one might not want to implement the system. Again, one wonders if this is a utilitarian line of thought. Are we trying to maximize utility or what?

2. Why not always prohibit?

1. P. 71. "The penalization of all impingements not consented to, including accidental ones and those done unintentionally, would incorporate large amounts of risk and insecurity into people's lives." People will worry that despite their best efforts they will be punished for accidental happenings.

Consider just acts that one knows in advance will cross a boundary. Why not require prior consent for all such? Problem: Prior consent may be impossible. It may be impossible to communicate with the person, or too costly.

Example: Smith wants to establish a widget factory, net gain \$1,000,000 per year. The factory necessarily emits pollution that causes small harm to many residents of a valley, \$1 per year harm to each of 500,000 people. If prior consent is required, then \$100 must be spent to make a deal with each person, total cost \$50,000,000. If deals would have to be renegotiated every ten years or so (things change), the factory will not operate. In contrast, if prior consent is not required but just full compensation, the factory operates and the factory owner fully compensates all valley residents by (say) throwing a party each year worth \$5 to each resident, cost to factory owner \$2,500,000. Everyone is better off under the rule that allows boundary crossing with compensation than under the alternative no-boundary-crossing-without-prior-consent regime.

Suggestion: We might qualify or interpret the natural rights system by adding an efficiency clause, either:

Strong Pareto: If one can change the status quo to make everyone better, one should do so.

Or

Weak Pareto: If one can change the status quo to make at least one person better off without making anyone else worse off, one should do so.

Boundary crossings (with compensation, without prior consent) are permitted if and only if efficiency requires that they be permitted.

Nozick explicitly rejects this proposal: He says, p. 73, "But efficiency considerations are insufficient to justify unpenalized boundary crossings for marginal benefits," even if more than full compensation is insisted on. He cites the page 71 considerations discussed above. But in my view, these considerations either lack argumentative force or they reduce to efficiency.

Another fairness consideration may enter in trying to decide whether some boundary crossings should be allowed provided compensation is paid. Amend the pollution case above. Pollution falls on just one person (he is extrasensitive) and he suffers costs of one dollar per year. He refuses to allow the factory to operate by consenting to compensation. He instead demands that the full yearly profits of the factory (\$1,000,000) be split with him. This hold-up seems unfair. (But maybe this is no worse than any agent taking advantage of a temporary monopoly position. Someone who owns the only coal in town may charge a lot of money for the coal if the factory owner really needs it and cannot substitute another fuel.)

Risky actions. Consider actions that impose risk of harm on others. One might deliberately impose risk of harm, say by playing Russian roulette on those who happen to be seated near you on a bus. One might also pursue an innocent goal; one's actions directed toward this innocent end as a side effect risk harm to others. One is building a house, and there is some risk the bricks one passes to upper stories as the house is being constructed will fall on pedestrians on the street below. One drives a car, which might crash into another driver or a pedestrian.

Question: Does an act that imposes risk of boundary crossing itself qualify as a boundary crossing? Phrased that way, the answer must be No. If one's act just poses a risk of boundary crossing, it actually crosses the boundary only if the risk ripens into a boundary crossing. But the substantive question remains: One might define a right so that acts that risk causing harm to the interest the right protects are themselves defined as boundary crossings (provided the risk is "great enough").

Again, one faces huge transaction costs and hold-up costs if one insists that prior consent must be obtained for any act that risks, to however slight an extent, impinging on the right of another person.

A particular worry is acts that pose a risk of causing uncompensable harms such as death. For these one might insist on prior consent, but this policy would be onerous if any imposition of risk of death however slight triggers the requirement of prior consent.

The Principle of Compensation. Nozick does not arrive at a considered view of how libertarian theory should deal with risky actions. For the purposes of the argument he is conducting about the possible legitimacy of the minimal state, he thinks he does not need to resolve these large issues. We can make do with a clear view of a piece of the bigger puzzle.

Suppose we prohibit an individual from engaging in actions that impose risk of boundary crossings on us. Nozick thinks that in some such cases we may prohibit only if we compensate those harmed in a certain way by the prohibition. The class of people who merit compensation in this way are those disadvantaged (relative to the normal situation) by the prohibition. Nozick: "Some types of action are generally done, play an important role in people's lives, and are not forbidden to a person without seriously disadvantaging him. One principle might run: when an action of this type is forbidden to someone because it *might* cause harm to others and is especially dangerous when he does it, then those who forbid in order to gain increased

security for themselves must compensate the person forbidden for the disadvantage they place him under." (Page 81).

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 With the Principle of Compensation, we get back to the central line of argument in chapters 1-5 of *Anarchy, State, and Utopia*. This is the argument against the individualist anarchist, to the effect that starting from anarchy, people might cope with its problems by acting in ways that have the perhaps unintended consequence that a Dominant Protective Agency (DPA) comes to exist on each territory that is (tantamount to) a state. Moreover, this could occur without the people whose actions bring about the state violating anyone's Lockean natural rights. The objections against the claim that the DPA is a state (or sufficiently statelike that we might as well regard it as a state) are (1) unlike a state, the DPA does not offer to protect everyone on its territory but instead protects only its paying customers, and (2) unlike a state, the DPA does not, and could not justifiably, claim a monopoly on the use of force and threats of force on its territory. Nozick in chapter 4 claims that the DPA, faced with independents who go in for self-help rights enforcement and are not paying customers, will prohibit self-help rights enforcement by independents on the ground it is too risky to its clients, and via the Principle of Compensation will be obliged to compensate the independents for the disadvantage thereby caused. The most efficient compensation consists in provision of free basic protection. Voila! The DPA in the end does de facto claim a monopoly on the legitimate use of force and violence within its territory and ends up protecting all who inhabit its territory (and being morally required to do that).