

Side Constraints, Lockean Individual Rights, and the Moral Basis of Libertarianism

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The brilliant discussion in chapter three of Robert Nozick's *Anarchy, State, and Utopia* is vitiated by an illicit slide between "some" and "all" or, better, between "to some extent" and "entirely."ⁱ In chapter three Nozick discusses the moral theory background to his Lockean libertarian doctrine of individual moral rights. He seeks to show that structural features of the account of moral requirements and permissions that most of us accept turn out to be reasons also to accept the more controversial Lockean libertarianism.ⁱⁱ

The brilliant part of the discussion describes the structure of a nonconsequentialist deontological moral theory that denies that each person ought always to do whatever would produce the impartially best outcome, even if the idea of the best outcome is interpreted as the greatest overall fulfillment of individual moral rights ranked by their moral importance. In this connection Nozick introduces the idea of a "side constraint" and of a morality that consists of side constraints, in whole or in part. This discussion advances our understanding of moral theory. We are all in Nozick's debt for this advance even if at the end of the day the case for accepting a consequentialist theory proves compelling.ⁱⁱⁱ

Here is the some/all confusion. Nozick tends to suppose that if there are constraints on what we may do, these constraints may never legitimately be overridden. From the fact that there are some side constraints that limit the permissible uses of a person to advance one's goals it does not follow that any such side constraint is absolute, exceptionless, may never be overridden by any other moral considerations come what may. Nozick does not completely ignore this possibility but repeatedly he writes as though a consideration he adduces that at most provides some support for the claim "there are constraints" also fully justifies "there are absolute constraints." Partly because the moderate position on rights and side constraints is shunted to the side in his discussion, and not confronted, what he says puts no pressure whatsoever on someone inclined to a moderate side constraint view to shift to the more radical side constraint absolutism.

This confusion is linked to another. This comes out clearly when Nozick observes, "Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent."^{iv} However, the idea that an individual is not to be treated merely as a means is most plausibly read as the thought that an individual ought to be treated only according to principles which she has good and sufficient reason to accept. The Kantian thought is that we should respect the rational agency capacity in all individuals and this requires acting toward them in ways, and only in ways, to which as fully rational agents they would consent. The difference between treating hypothetical rational consent and actual consent as a strict moral constraint on how one ought to treat others is momentous. Nozick just assumes that given a

background in which people are not interacting and none is harming anyone in ways that count as libertarian rights violations, forcing someone to act as one wills (who has not consented to be so treated) is immediately and obviously morally wrong. But once one has in mind the possibility that my refusal actually to consent to what you propose may reflect grotesque stupidity on my part or my horrible failure to show due consideration for myself or for other persons or both things together, Nozick's assumption looks to be flatly wrong.

1. A nonconsequentialist morality of side constraints and options.

The insightful part of Nozick's discussion nowadays sounds boringly familiar. This impression is testimony to how thoroughly his analytical points have become accepted knowledge. Others had surveyed this same conceptual territory, but Nozick's treatment adds clarity. He notes that our common-sense morality has a nonconsequentialist structure, the core of which is that one is not permitted always to do whatever would produce the impartially calculated best outcome, even if the idea of the best outcome is interpreted as the greatest overall fulfillment of individual moral rights ranked by their importance. This latter interpretation would be suitable if moral rights were correctly understood just as claims that society ought to ensure are honored. However, this is not our ordinary common-sense understanding of individual moral rights. A right is an agent-relative side constraint on action not a goal to be promoted. A side constraint is to be interpreted as follows: in deciding which of the available options for action one should pursue at any given time, one should eliminate from consideration those options that would involve one's violating any individual's moral rights. One then is morally at liberty to choose any of the remaining options and act in that way, whether or not doing so would lead to the best outcome one could achieve according to the appropriate standard of outcome assessment. For example, if an individual has the right not to be assaulted, then in deciding what to do one should eliminate from consideration any action options available for choice that would involve one's assaulting that individual. As Nozick puts it, the imperative of rights tells each of us "Don't [you] violate anyone's rights!" not "Act in such a way that rights fulfillment overall is maximized!" In another terminology, individual moral rights and any other moral side constraints there are issue in agent-relative reasons—meaning that any adequate indication of the reason will contain an ineliminable reference to the agent.^v

A side constraint view might be conjoined to a moral doctrine that requires people to promote good outcomes. The duty to promote good outcomes might compete with side constraints and sometimes override them. The duty might also be subordinated to side constraints, so that the duty to promote the good never requires one to violate any side constraint. Accepting the duty to promote the good, either in partnership with side constraints or in subordination to them, we might also accept that the duty to promote the good is qualified by a personal prerogative that allows one to pursue one's own favored aims, to some extent, even when forgoing this personal pursuit would enable one better to promote the impartial good. Nozick takes a simple and in a way elegant line here. He affirms no binding moral requirement of any sort to promote what is good by one's actions. One might commit oneself by making a contract or promise to the equivalent to another person, and then the other person has a right that one carry through this commitment. Apart from these commitments that always stem from voluntary undertakings, according to Nozick one is morally free always to choose any act available

for choice that is not ruled out as ineligible by conflict with an applicable side constraints. In one's conduct one must conform to the side constraints that bear on one's choice, beyond that, all available acts are morally open for choice—they are moral options.^{vi}

Nozick continues his chapter three discussion with a characteristically virtuoso wide-ranging performance. In a short space he raises a host of issues that arise in considering a morality of side constraints and options, including what we owe to animals, what characteristics a being must have to qualify as a person with all the rights that go with that status, and so on. His discussion also contains brilliant asides that so far as I can see have no bearing at all on the issues under discussion. Of these, the most well known is his short, trenchant discussion of the question, whether anything matters or should matter to us beyond the quality of experience we have.

2. Tunnel vision.

Facing this cornucopia of achievements to praise in the chapter, one is disappointed to find that the main line of argument from the side constraint idea to the more controversial Lockean libertarian doctrine is pretty meager.^{vii} It is odd to find such poverty alongside such wealth. The objections I develop in this essay barely need stating; they virtually leap at the reader from Nozick's text.

For our purposes the claim that the content of morality consists in a set of Lockean libertarian individual moral rights may be interpreted as follows.

1. Each person has a moral right to act in whatever way she chooses with whatever she legitimately owns so long as she does not thereby impinge on others so as to cause them harm or frustrate some interest of theirs in certain specified ways (force, fraud, theft, physically harming another person or her property, breach of contract, or threatening to do any of the previously mentioned items on this list).
2. Each person has a right that others not act in ways that impinge on her in any of these certain specified ways.
3. Each person legitimately fully owns herself. No one has any initial property rights in any other person.
4. Each person can acquire full ownership over unowned material resources (pieces of the Earth) by staking out a claim to them, so long as her claiming ownership and maintaining ownership leaves others no worse off than they would have been under a system under which these resources remain unowned and freely available for use by anyone.
5. The ownership rights that individuals have over themselves and acquire over material resources can be transferred to other persons in whole or in part by gift or contract (or abandoned so they revert to unowned status).

That fundamental individual moral rights have the particular content Nozick assigns to them is one controversial feature of this doctrine. A more general controversial feature is that the fundamental moral rights of individuals are all of them negative rights not to be harmed or aggressed upon in certain ways and none of them positive rights to be aided by others in any way. A related controversial feature is that the fundamental moral requirements that limit what any individual may permissibly do are all side constraints or limits as opposed to moral goals to be promoted. Still another controversial feature is that these side constraints are absolute and exceptionless. They are rules that admit of no exceptions and must always be followed and are never overridden by any other moral considerations that bear on choice of action.

The claim that it is controversial that a proposed set of moral rights holds absolutely and without exception is not crystal clear. Exceptions to a rule could be incorporated into the rule, and the question then arises, is the revised rule exceptionless? If not, reiterate the process. One might think that in principle, some exceptionless rule always underlies any rule allowing exceptions, even if we lack epistemic access to it. Even if the legitimate exceptions are uncodifiable, one might suppose one can amend the rule by adding that it holds unless certain specified factors, in particular circumstances, generate reasons that outweigh it. A set of side constraints may not be compossible: respecting one constraint in some circumstances might require violating another constraint. So a complete statement of the side constraint morality includes priority rules specifying which side constraints trump others in the various possible circumstances in which they can conflict. At any rate, it is plausible to hold that at the fundamental level, the correct moral principles must hold universally and necessarily, so if the project is to conceive fundamental principles as assertions of individual rights, why is it controversial to claim these moral rights hold without exception and are not overrideable?

The problem is that negative rights not to be harmed or interfered with in certain ways as Nozick conceives of them are to hold come what may, whatever the consequences of abiding by them in any possible circumstances. For any Nozickian right of this sort, the consequences of conformity to this rule can be bad, sometimes extremely bad, and quite possibly horrendously bad. Nozick is adamant that side constraints in the form of Lockean rights do not incorporate any relaxation of their requirements on conduct in view of the consequences that respecting them would generate. In a wily footnote, Nozick acknowledges a difficulty lying in wait: “The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.”^{viii} Many adherents of nonconsequentialist morality would contend that the problem arises in noncatastrophic scenarios. They hold that individuals have rights, but any such right gives way when the consequences of not violating it are excessively bad.

The denial of interpersonal comparisons of good.

Nozick presents several arguments and hints of arguments in support of the general idea that morality has a side constraint structure and the more specific claim that this side constraint morality consists in a set of individual moral rights with a Lockean libertarian shape. One argument appeals to doubts about whether the idea of summing gains and losses across persons to determine the overall social benefit from alternative actions and policies is even coherent, let alone plausible. Nozick asks, “But why may one not violate persons for the greater social good?” He notes that we do not regard it as morally problematic if a person balances costs and benefits within her own life, accepting a smaller loss now to avoid a larger loss later. Nozick continues,

Why not, *similarly*, hold that some persons have to bear costs that benefit other persons more, for the sake of the overall social good? But 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. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more.”^{ix}

Of course, one who supposes it makes sense to sum benefits and losses across persons need not hold that there is some collective entity that benefits when overall benefits are increased. The claim is just that, for example, when violating Smith's right to his extra shirt button brings it about that Smith suffers slight inconvenience and Jones and Black are cured of dread diseases and enabled to enjoy many extra years of good life, the well-being loss that accrues to Smith is far less than the well-being gains that Jones and Black gain.

This leaves it open for Nozick to deny that interpersonal comparisons of well-being are well-defined even if there are examples in which aggregation of well-being gains and losses across persons appears intuitively plausible. Common-sense intuitions in this matter might be wrong. Notice that Nozick's opponent need not insist on full comparability—a scale of well-being that enables one to determine, for any combinations of gains and losses of any types of goods and bads across any number of people, that it is always metaphysically determinate or epistemically determinable what exact well-being total would result. Partial comparability, in this context, will do. Nozick is claiming that side constraints may never be overridden on the ground that doing so would produce sufficiently greater overall good to justify the override, because greater overall good can never be determined. This claim falls to the ground if sometimes, it can be determined that violating a side constraint would bring about a sufficiently large boost in overall well-being (or avoidance of loss) to justify the violation.

Defenders of Nozick's position could dig in their heels and deny that one can make any sense of the idea of interpersonal comparisons of well-being. This strategy is possible, but carries costs. The premises to which one must appeal to justify skepticism about the coherence of commensurability of the good might also tend to undermine the side constraint advocate's nonskepticism about the existence, nature, and justification of individual rights and other moral constraints. If we screw up our epistemic standards to the point where we cannot say whether a life with ample friendship, love, pleasure, meaningful work, achievement, genuine empirical knowledge world and the causal forces that operate within it, and wisdom concerning practical affairs is better or worse than a life that lacks all these things, what makes us think that any claims about what moral rights people have are going to withstand critical scrutiny?^x For starters, how does the Nozickian determine that some rights violations are more serious than others, and so merit greater punishment, and justify greater imposition of harm on those who are in the process of carrying out some rights violation, in order to prevent their success?

The root idea and self-ownership.

Nozick writes, "The moral side constraints upon what we may do, I claim, reflect the fact of our separate existences. . . . There is no justified sacrifice of some of us for others. This root idea, namely, that there different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints" and also leads to a specifically libertarian understanding of the content of side constraints.^{xi}

There are several ideas here. One is that interpersonal comparisons of good are impossible. Nozick is also committed to the idea that interpersonal comparisons of rights fulfillment are impossible, so that one can never justify, for example, violating Jones's right by taking an extra shirt button he owns in order to prevent Alicia from being raped on the ground that the right of Jones that would be violated is less important or less

morally weighty than the right of Alicia that would be violated if we refrain from violating Jones's right.^{xii}

Another suggestion in the passage does not depend on any sort of skepticism about interpersonal comparisons of good or right. Suppose we can weigh different people's goods and rights and correctly determine what outcome of those we might reach would be morally best. This information, even if we can obtain it, is morally irrelevant for determining the content of people's moral rights and corresponding duties (the content of a side constraint morality). Each person has her own life to lead, separate from others, and so no sacrifice of one in order to benefit others can be warranted.

Let us grant that each person has her own life to lead, and that each human individual's life has a unity over time from start to finish that distinguishes it sharply from any other individual's life. (In my view, the basis of this unity is the spatio-temporal continuity of a single live, functioning brain.^{xiii}) These truths are compatible with many opposed moralities besides libertarianism—utilitarianism, liberal egalitarianism, and egoism, to name three. So maybe the crucial claim inherent in what Nozick calls the libertarian "root idea" is that no one may permissibly impose sacrifice on one person, not even to benefit others. This still cannot be quite right. The libertarian norm forbids *harmless* aggression against or interference with another along with the harmful variety. Nor can the crucial idea be that impositions that involve intrapersonal compensation can be acceptable whereas impositions that involve interpersonal compensation cannot be. Nozick does not endorse the idea that it is morally permissible to violate a person's moral rights whenever one follows that by fully compensating the individual for the injury. Moreover, as Nozick emphasizes, the basic moral rights ascribed to each individual by libertarian doctrine include a right against paternalistic interference—restriction of an individual's liberty against her will for her own good. Paternalism so understood always includes a promise of intrapersonal compensation that more than outweighs the cost to the individual of the restriction of her liberty. The individual in Nozick's view, being sovereign over her own life, has an absolute, exceptionless right against such interference regardless of the benefit to herself that is part of the paternalistic package.

If the assertions in the previous paragraph are on the right track, then the root idea around which Nozick's argument for side constraint morality and libertarian morality pivots cannot be just the claim that individuals have separate lives and none may permissibly be sacrificed for others. A better candidate for this pivot role is self-ownership--the claim that each human adult person initially has full ownership rights over herself and no one initially has any property rights in any other person.^{xiv} Owning oneself (including one's body), one is free to do with oneself whatever one chooses so long as one does not harm others in certain ways. Like any property rights, property rights in self are fully transferable and waivable by individual voluntary consent. What one owns, one may use and abuse and destroy as one chooses.

The self-ownership idea needs further elaboration. Even as just adumbrated, the idea looks to be deeply flawed.^{xv} That prior to voluntary transfer of rights no one has any ownership rights in any other person means that there are no enforceable duties of solidarity to aid those in need. That rights in oneself are all fully alienable and waivable means there are no enforceable duties to oneself. This thought jars against the conviction that possessing rational agency capacity and having a life to live gives one dignity and entails a duty to make something worthwhile of the (except in rare, tragic cases) valuable

opportunity to live a life. This duty rules out suicide and destruction of one's rational agency capacities for no good reason as morally impermissible.^{xvi} The idea that someone's voluntary consent to a transaction, however unreasonable the consent, just so long as it passes a threshold of voluntariness, licenses one to do to that person whatever she has consented to, however grotesquely bad, makes a fetish of actual voluntary consent and grossly exaggerates its moral importance.

The phrase "the fact of our separate existences" may suggest a picture of people living autarchically on land they cultivate, no one being dependent on others or vulnerable to others except that each would suffer if others physically aggressed against them. But suppose our separate existences are frequently intertwined, as in this scenario. We find ourselves in a large pit, being preyed on by a wild beast. If we all stand and fight together, we can defeat the threatening predator. Each of us would improve her chances to live and live well if all of us joined the effort to fight against the beast, and each of us benefits roughly equally from reductions in risk of suffering predation. A common defense effort is organized, but some fight and some shirk, and the shirkers benefit from the efforts of the fighters just as much as fighters themselves do. Plus, the shirkers do not put themselves at risk as fighters do. If a fair scheme for providing public goods that assigns everyone duties to contribute and that brings about a roughly fair distribution of benefits and burdens if each person does her assigned part is in place, the shirkers can appeal to Nozick's self-ownership norm to insist that there is no enforceable duty to contribute one's share to fair schemes for provision of public goods in circumstances like those described, which as a matter of fact are ubiquitous in modern life. The right of self-ownership includes the moral right to be a free rider.^{xvii}

Nozick might respond that individuals surely have rights to live as they choose, and there is no nonarbitrary way of singling out any of the infinite number of positions between full self-ownership and no self-ownership as morally special. Individuals cannot be deemed to have no self-ownership, so they must have full self-ownership.

In reply: First, if it is morally arbitrary at what point one cuts into a line, declaring that acts that are permissible when located on one side of the line are impermissible when they lie on the other side, the moral arbitrariness of cutting here rather than there is not lessened by selecting one of the extreme end points of the line as the point at which to make the cut. Ex hypothesi the end points are just points on the line, the same as any other points, and enjoy no special moral status. Also, the particular end point of the line that Nozick singles out as uniquely morally privileged looks from a variety of plausible moral perspectives to be uniquely indefensible. Self-ownership is not an especially appealing abstraction, and when one examines its implications, no hidden allure is revealed. Finally, I deny the assumption that no middle-of-the-road position could correctly reflect the balance of opposed moral reasons.

Imagine that someone is about to commence savagely beating a helpless small child with the intent of murdering her. There is every reason to believe this enterprise will be successful: the child will suffer horrible pain and then die a victim of wrongful homicide. Apart from the bad luck of falling victim to this murderous assault, the child would have a long life, well worth living. The parents of the child can see what is happening, but by sheer bad luck are so placed that they can do nothing to block the impending murder. As it happens, I am in a position to act, at some cost and risk to myself, to prevent the assault and save the child's life. I have my own life to lead,

however, and I am engrossed on fiddling with my stamp collection. I prefer to keep working on my stamp collection and allow the murder to proceed. This is a morally nasty attitude, Nozick can agree. However, Nozick's position is that "individuals are ends and not merely means: they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable." The child has no right to my assistance in preventing his murder. Moreover, it would be a violation of my Lockean rights, and thus morally wrong, for anyone to threaten or coerce me or attack me in order to induce me to act to save the child, no matter how slight the cost or risk to myself of doing so. Lockean rights are trumps in moral discourse: in conflict with any other moral consideration, rights by themselves entirely determine what is morally permissible, forbidden, and required. This is the idea that persons are inviolable.

The example illustrates the point that in the Lockean perspective, persons, though inviolable, are entirely ignororable.^{xviii} The fact that you are in peril and I could help you never by itself gives you any moral right to my assistance, no matter how grave your peril and no matter how slight the cost I must bear to render the assistance. The circumstances might make it the case that it would greatly profit me to help you, saving your life, and the only cost I must bear is forgoing another opportunity: by ignoring you and making a deal to sell some of my stamps, for example, I could make slightly more profit than I could make by saving your life. Even here, my right to ignore your peril does not diminish even by a jot.

Someone might object to my use of hypothetical examples to argue against Nozick's conception of the moral rights that individuals possess. The ground of the objection is that my examples are far-fetched extreme possibilities. In practice the administration of a Lockean rights regime would work out tolerably well for people.^{xix}

The objection reflects a basis misunderstanding of Nozick's position. Nozick is not proposing Lockean natural rights as a policy proposal to be assessed by its overall likely effects. He is making a proposal as to what we owe one another as a matter of fundamental moral principle. A fundamental principle holds always and everywhere and is not merely true but necessarily true. At this level of argument, a single counterexample to a principle defeats a proposed principle. If the principle yields recommendations in any possible situation that after reflection we find we cannot accept, the principle must be rejected.

However, any argument by counterexample is subject to evaluation by wide reflective equilibrium methods. In the present state of moral theory, any candidate moral principle is likely to have counterintuitive implications in some possible situations. Most people's considered judgments taken together are inconsistent, they cannot all be true together, and some doubtless reflect prejudice and reactions that would not withstand ideally extended critical deliberation. In this context, any candidate moral theory or set of principles is likely to offend common-sense judgment in one way or another. The moral principles that we should provisionally accept are those that taken as a whole best match our considered moral judgments after critical deliberation. If our current moral inclinations are latently inconsistent, no such match will be perfect, so no single anomaly defeats a proposed principle. The argument against Nozick's conception of Lockean moral rights has to be that it massively offends deep-seated moral convictions that further critical reflection only entrenches and that some available rival moral view does better on this score.

The idea that Lockean rights are trumps in reasoning about what one morally ought to do is a crucial point. An alternative view might interpret moral rights just as the Lockean does but hold that other moral considerations can oppose and sometimes outweigh rights. This type of view need not endorse the implications of Lockean rights with respect to the entire absence of enforceable duties to aid those in peril or to promote the aggregate fulfillment of moral rights weighted by their moral importance) that I have been at pains to highlight.

Nozick's main argument.

Nozick's main suggested argument in support of the Lockean libertarian conception of rights turns on his claim that side constraints set absolute, exceptionless requirements on individual conduct. The idea is that the root idea that individuals have separate lives to lead and no one may be sacrificed for others is the best explanation for the fact that there are absolute side constraints. Given our conviction that there are absolute side constraints, an inference to the best explanation of this fact supports the root idea, and this root idea in turn implies the specific Lockean libertarian conception of rights as side constraints. Since we are talking about moral explanations, the claim is this: What justifies the claim that morality has a side constraint structure also justifies the claim that the content of these side constraints is the set of Lockean libertarian rights.

The argument then goes as follows:

1. There are morally binding, absolute, exceptionless side constraints.
2. The best justification of the moral claim that there are morally binding, absolute, exceptionless side constraints is that individuals have separate lives to lead and no one may be sacrificed for others.
3. The best justification of a true moral claim is itself true.
4. It is true that individuals have separate lives to lead and no one may be sacrificed for others.
5. From the truth that individuals have separate lives to lead and no one may be sacrificed for others and further uncontroversially true premises it deductively follows that individuals have moral rights according to the Lockean libertarian conception of individual moral rights.

This argument goes awry with premise 1. Even if the rest of the argument were unimpeachable, the starting point is not one we should accept. Nozick is then engaged in something akin to a transcendental deduction of a non-fact. He is seeking the conditions that must hold if there are absolute side constraints, but it is not sensible to accept that there are any such entities, so even if the Nozickian root idea were uniquely and ideally suited for the role of justifying the existence of absolute rights, that is not a reason for anyone to accept the root idea and with it the Lockean conception of individual rights.

Suppose that contrary to my insistence, there do exist absolute, exceptionless moral side constraints. Would Nozick's root idea be the best explanation of this moral fact? (Compare the question: If it were morally acceptable to torture animals for fun, what would be the best justification of this fact?) This is an interesting question, but not one this essay pursues. I will simply note that this essay has tried to show that Nozick's root idea, fully articulated, amounts to self-ownership, and there are good reasons to reject self-ownership, quite independently of the issue, whether or not there are absolute, exceptionless side constraints.

The denial that there are absolute, exceptionless rules might sound overly dogmatic. If there are fundamental moral principles, they will hold necessarily and universally. They will be absolute, exceptionless moral rules. So one might hold.

I want to set this issue aside. Let's just assume—what I suppose is anyway true—that there are fundamental principles that hold universally, necessarily, and without being conditioned on any empirical facts. It still remains implausible to hold that there are absolute, exceptionless moral rules of the type the Lockean libertarian upholds. Such rules identify a type of act by some putatively wrong-making feature it possesses and say no act of that type is ever morally permissible, whatever the consequences in particular circumstances of refraining from doing an act of that type. Prominent examples of such codes include the biblical Ten Commandments and the standard set of Lockean individual moral rights. Such codes might be regarded as practical rough guidelines for ordinary choices rather than as fundamental moral principles. They might be more plausible in the former role, but Nozick insists that they should function in the latter role. But consider, for example, the norm that one has a right not to be physically assaulted. Some assaults are very minor inconveniences, and some assaults do an enormous amount of good, so a blanket exceptionless prohibition is unreasonably rigid. A sensible nonconsequentialist morality is not one that pays no heed to consequences. This means that any remotely plausible statement of a set of rights intended to form a set of fundamental moral principles would have to include qualifications to the individual rights specifying what to do in the case of conflict of rights and qualification in the form of a beneficence principle and a weighting principle that determines when a right should give way in virtue of the fact that the consequences of upholding it would be excessively bad.

Nozick writes as though he is supposing that either morality has “an end-state maximizing structure” or there are absolute side constraints. He comments, “The stronger the force of an end-state maximizing view, the more powerful must be the root idea capable of resisting it that underlies the existence of moral side constraints.”^{xx} If there are these opposed moral forces as Nozick suggests, one wonders why he does not consider that perhaps the truth of the matter is a resultant of these forces—a hybrid moral view that combines side constraints and moral goals. The fundamental moral principles would affirm both and include rules that balance the two factors and assign the proper weights to each. The side constraints so understood would not be absolute and exceptionless, but so what? Nozick must be assuming this balancing project faces insuperable obstacles, but he does not say what these might be.

One obstacle stares us in the face. Perhaps there is no morally nonarbitrary way of balancing these disparate moral elements that hybrid views combine. If side constraints are nonabsolute and admit exceptions, the question immediately arises, how does one decide in a principled way under what circumstances exceptions should be made. If no satisfactory answer to this question is forthcoming, my dismissive response to Nozickian absolutism will have been ill-advised.

My answer leans heavily on work on this topic by Judith Thomson.^{xxi} She notes that rights vary enormously in their importance. If one's moral rights include property rights, then I certainly have a property right over the extra button on the shirt I am now wearing. The shirt is my property, and the extra button is part of the shirt. But surely it is implausible in the extreme to suppose that there are no circumstances in which it would be morally right all things considered for someone to act against my property right in the

button by taking it without my express or implied permission. Moreover, although types of rights can be important or unimportant—the right to free speech is important—for purposes of determining when it is morally permissible to act against someone’s particular right, what matters is the importance of this particular token of that type of right. Adapting a suggestion made by Thomson, I propose that what is decisive is how much in total nonrightholders would lose, if the right is respected, compared to how much in total the rightholder would lose, if the right is not respected. In Thomson’s words, “It is permissible to infringe a claim if and only if infringing it would be sufficiently much better for those for whom infringing it would be good than not infringing it would be for the claim holder.”^{xxii}

She qualifies this suggestion by what she calls the High-Threshold Thesis. This says that it is permissible to act against a right only if there is a single nonrightholder for whom it would be sufficiently good that the right is not respected, given the harm that the rightholder would suffer in that case, to justify the infringement of the right. In other words, the High-Threshold thesis rules out the possibility that small gains to each of many nonrightholders if the right in question is not respected might add up to a sufficiently great amount of good to outweigh even a large harm that would be suffered by the rightholder if the right is not respected. We are not permitted to add up gains and losses to many people in this way, to determine if acting against or infringing a right in particular circumstances is permissible. Instead what is called for is pairwise comparison: compare what the rightholder would lose if the right is not respected, to what each nonrightholder would lose if the right is respected, in turn.^{xxiii}

One might worry that one needs to modify the Thomson account by some personal responsibility factor. Suppose that if you infringe my right not to be assaulted by inflicting a slight cut on my finger, I will respond to this incident with culpable recklessness or carelessness, with the result that I get gangrene in my finger and my arm must be amputated to save my life. Suppose that if you infringe my right by inflicting this (what should be a trivial) cut, you can thereby bring about great gains for nonrightholders, that sufficiently outweigh the loss I would have suffered from the cut if I had responded with anything close to reasonable prudence. This should qualify as a case of permissible infringement, even if I end up dead.

I accept the Thomson framework for determining under what circumstances it is morally permissible to act against (infringe) someone’s moral right. I alter the account only by dropping the High-Threshold Thesis. This surely must be done. Consider a case in which one would have to infringe Smith’s right not to have his arm broken in order to prevent some large number of people from suffering a fate just a tiny bit less bad than the bad that accrues to Smith if his arm is broken. Surely there is some number of lesser harms that would accrue to many people if Smith’s right is not infringed that outweighs the harm that accrues to Smith if his right not to have his arm broken is infringed sufficiently to justify acting against the right—breaking Smith’s arm. At least, this must be so if moral rights can ever be overridden for any reason. As the number of suffering nonrightholders increases in this example, the case for acting against the right becomes increasingly weighty. Thomson’s High-Threshold thesis oddly would have it that if one individual nonrightholder would stand to suffer a harm that is just barely insufficient to justify acting against Smith’s right, then no number of additional rightholders suffering that same nearly sufficient harm could tip the moral scales, no matter what, but on the

other hand if we discovered we had been wrong in our initial assessment and the sole nonrightholder in the example would stand to lose just a tiny jot more if Smith's right is not infringed, Smith's right does give way. This is unacceptable.

If it is morally acceptable to add up benefits and losses that would fall on the ensemble of people who would be affected if we refrain from acting against someone's right or do act against it, we then end up accepting Aggregation. This is the claim that for any moral right or claim possessed by one individual, however morally important or stringent the right, it may be overridden if sufficiently greater harm would accrue to nonrightholders in the aggregate, and for any harm however tiny that might accrue to a nonrightholder, the right in question may be overridden if each of sufficiently many nonrightholders would suffer that tiny harm if one does not act against the right.

Aggregation is in a way a strong claim, which many are inclined to reject.^{xxiv} In another way it is a very weak, claim, since it says nothing about the correct tradeoff ratios that determine when any given right would be morally overridden in any given circumstances. These could be very steep indeed, consistent with Aggregation.

So what are these tradeoff ratios? The skeptical worry still obtrudes. However, as I see it, this is simply another case in which one follows reflective equilibrium methods, surveying a wide range of cases and considering moral principles that match one's general and particular intuitions until one finds a stable match after ideal reflection. If one accepts any plural values at any place in one's theories of the right and the good, and also insists that when plural values conflict, there is sometimes a correct weighting that determines what one morally ought to do all things considered, then one must accept the legitimacy in principle of seeking to discover proper weights by reflective equilibrium methods. There is no special problem here about deciding on the stringency of moral rights; this is just another case of plural values to be balanced. Nozick faces an issue of this kind in chapter four of *Anarchy, State, and Utopia*, where he acknowledges that there are plural, independent, weighty moral factors that together determine when it is permissible to act against a right provided compensation is paid to the rightholder and when it is impermissible to inflict this combination of rights violation plus compensation on an individual.^{xxv}

Rational agency capacity and meaningful life.

Nozick thoughtfully addresses the question, what traits must a being possess, to be morally considerable, and further, to qualify as a person with moral rights. He focuses on moral limits on how we may treat higher animals, so does not explicitly consider the conditions for the lowest moral status. His view is roughly that insofar as an animal possesses some but not all of the traits necessary for personhood, the animal is owed moral consideration, the amount varying with the extent to which the being comes close to personhood status. Regarding personhood, he affirms possession of rational agency capacity as the necessary and sufficient conditions for this status. He stresses that rational agency capacity, to be a credible criterion for personhood, has to be interpreted as including capacity for formulating and pursuing long-term plans: a person is "a being able to formulate long-term plans for its life, able to consider and decide on the basis of abstract considerations or principles it formulates to itself and hence not merely the plaything of immediate stimuli, a being that limits its own behavior in accordance with some principles or picture it has of what an appropriate life is for itself and others, and so on." Rational agency capacity so understood includes affective and volitional as well as

cognitive capacity. The volitional capacity in question includes a capacity for second-order volition. Possession of rational agency capacity at some threshold level or beyond endows one with the moral status of person.

Nozick suggests that inquiring into the necessary and sufficient conditions for personhood will generate a further argument in support of the claim that the moral rights that persons have and the moral constraints by which they are bound are exactly the rights and constraints specified in the Lockean libertarian conception. Once we see clearly what it takes to be a person we will understand why persons are inviolable, with inviolability cashed out in terms of possessing absolute, exceptionless Lockean moral rights.

Nozick's development of this suggestion is sketchy. He suggests that a being with the capacity for rational agency capacity in his expansive sense is a being with a capacity for meaningful life. "A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity so to shape his life can have or strive for meaningful life."^{xxvi}

I cannot make anything of this suggestion. A life might be meaningful in that a reasonable impartial observer would rate it as meaningful. Alternatively, one might hold that an individual life is meaningful only if the individual herself finds meaning in her life and subjectively affirms her life to be meaningful. The latter strikes me as unpromising: suppose Alessandra is a great athlete, has enjoyed stable rich friendships, has run a successful business, written excellent novels, and so on, but oddly believes that only being an astronaut or a religious visionary could make one's life meaningful and views her own life as meaningless because it falls short of that standard. Al on the other hand has stumbled through life in a deadening alcoholic stupor but believes his life is deeply meaningful. The former suggestion is best interpreted as follows: the more one's life includes genuinely worthwhile goods, with accurate appreciation being one of those goods, the more meaningful one's life. The good life is one type of meaningful life. Another is an admirable life, which involves doing what is morally right, in ways that significantly benefit others, but at the cost of leaving one's own life mainly bereft of good. Nozick suggests that shaping one's life according to some overall plan constitutes one's life as meaningful, but surely a person could drift from day to day but still make great decisions each day in response to that day's opportunities, which by luck turn out to be wonderful. This life would fail to be meaningful by Nozick's test, which looks to be too narrowly drawn in light of the example.^{xxvii} One might say a meaningful life is one that could have been shaped by a reasonable person planning her life, even if in fact it was not so shaped.

However exactly we interpret the idea of a meaningful life and whatever importance we assign it, I see no connection between meaningfulness and Lockean constraints. Is one's life meaningful just to the extent one respects Lockean constraints and does not suffer violation of one's Lockean rights? Consider Sam, who upon reaching adulthood falls off a cliff and dies. He overestimates his agility, perhaps, or underestimates the slipperiness of the rocks, or perhaps is moved by an immature romantic ideal of dying young in the face of natural peril, even if the peril is self-imposed. He's not a skilled climber doing what he loves most in life, he's unathletic and acting on a whim. Were he to suffer a paternalistic restraint before venturing on the fatal jaunt, he would, let's assume, grow more mature and lead a choiceworthy life. Or

consider Bea, who lives in dire poverty, and is never able to exercise her capacity for ambition formation. She just races on a treadmill to survive and dies young. If she were provided a small sum of capital by means of redistributive taxation in violation of people's Lockean rights, she would have escaped from the grinding treadmill of poverty, gone to school, developed her abilities, lived well. Or for that matter consider Tony, who engages in youthful transgressions, including violations of people's Lockean rights, but the rights violations he inflicts are not serious, and anyway he repents, and goes on to lead an enviable, upright life.

ⁱ. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

ⁱⁱ. On John Locke's views, as opposed to "Lockean" libertarianism, see A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992). For a Locke-inspired left-wing version of libertarianism, see Michael Otsuka, *Libertarianism without Inequality* (Oxford: Oxford University Press, 2003).

ⁱⁱⁱ. A major element in any plausible defense of act consequentialism is the discussion of distinct levels of moral thinking in R. M. Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford: Oxford University Press, 1981), chapters 2 and 3. Another major element in the case for act consequentialism is the baroque complexity which defenders of nonconsequentialist moral theory are driven to ascribe to the moral principles they uphold. See Shelly Kagan, *The Limits of Morality* (Oxford: Oxford University Press). See also Frances Kamm, *Intricate Ethics* (Cambridge: Harvard University Press, 2008). For the record, I uphold act consequentialism. In this essay I argue that if we had to choose between a morality of moderate, limited side constraints and a Nozickian morality of absolute, exceptionless side constraints consisting of Lockean libertarian rights, we would come closer to the truth by embracing moderation.

^{iv}. Nozick, *Anarchy, State, and Utopia*, 30-31.

^v. The terminology of agent-relative versus agent-neutral reasons does not appear in Nozick's discussion, but the idea is implicit in what he does say. Thomas Nagel introduces the terms in *The View from Nowhere* (Oxford: Oxford University Press, 1986), 152-153.

^{vi}. Some caution is needed in stating this point. Nozick does not deny that an action that one has a moral right to perform can be criticizable from various moral perspectives. I have the right to drink all of the lemonade, since it is my property, but still it might be nasty on my part not to share it with my thirsty brother. The key Lockean libertarian claim is that rights are trumps in the sense that other types of moral considerations do not limit or expand the rights one has and one must always respect everyone's moral rights in any decision problem one faces regardless of how non-rights considerations might bear on the situation.

^{vii}. Here I echo the verdict of Thomas Nagel in his review of *Anarchy, State, and Utopia*, "Libertarianism without Foundations," *Yale Law Journal* 85 (1975), reprinted in his collection *Other Minds: Critical Essays 1969-1994* (Oxford and New York: Oxford University Press, 1995), pp. 137-149.

^{viii}. Nozick, *Anarchy, State, and Utopia*, p. 30, footnote.

^{ix}. Nozick, *Anarchy, State, and Utopia*, pp. 32-33.

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- ^x . The question posed in the text is an open question, not a rhetorical question. See, for example, Marc Fleurbaey, *Fairness, Responsibility and Welfare* (Oxford: Oxford University Press, 2008), for a sophisticated attempt to elaborate a theory of justice while eschewing interpersonal comparisons of welfare. He is working in the economics tradition of “fairness theory” as developed by Hal Varian and others.
- ^{xi} . Nozick, *Anarchy, State, and Utopia*, p. 33.
- ^{xii} . On this issue, see Amartya Sen, “Rights and Agency,” *Philosophy and Public Affairs* 11 (1982), pp. 3-39.
- ^{xiii} . This physical criterion of personal identity is elaborated and criticized in Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), Part II. Its foremost recent defender is Bernard Williams.
- ^{xiv} . Of course, self-ownership can hardly be a rock-bottom premise in an argument for libertarian rights. Self-ownership presupposes the importance of the moral distinction between doing and allowing, the idea that each person has certain moral rights not to be harmed or interfered with in certain ways, and so on. A deontological morality is a cloth that weaves together many threads, many notions. Lockean libertarianism is one version of deontological morality, and is itself a combination of distinct moral ideas. We should not take too seriously Nozick’s offhand suggestion that there is a single “root idea” that justifies both the side constraint form of morality and its libertarian content.
- ^{xv} . See Richard Arneson, “Self-Ownership and World Ownership: Against Left-Libertarianism,” *Social Philosophy and Policy* 27 (2010), pp. 168-194.
- ^{xvi} . For elaboration, see Richard Arneson, “Joel Feinberg and the Justification of Hard Paternalism,” *Legal Theory* 11 (2005), pp. 259-284.
- ^{xvii} . See Nozick’s brief discussion of this topic in *Anarchy, State, and Utopia*, pp. 90-95. This discussion has given rise to much commentary. A. John Simmons broadly defends Nozick’s line of thought in ch. 5 of his *Moral Principles and Political Obligation* (Princeton: Princeton University Press, 1979), and in “Fair Play and Political Obligation: Twenty Years Later,” in his *Justification and Legitimacy; Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001). I argue for some claims asserted in this paragraph in my “Doubting and Defending the Principle of Fairness.” See also my “The Principle of Fairness and Free Rider Problems,” *Ethics* (1982).
- ^{xviii} . See Kasper Lippert-Rasmussen, “Moral Status and the Impermissibility of Minimizing Violations,” *Philosophy and Public Affairs* 25 ((1996), pp. 333-351.
- ^{xix} . Nothing in the text tells against the possibility of defending something close to Lockean libertarian rights as policies on the ground that implementing them will produce better consequences than any feasible alternative policies would produce. Such a position is utterly different from the natural moral rights position that Nozick defends. This broadly consequentialist approach to the defense of Lockean libertarianism is pursued by Richard A. Epstein in *Simple Rules for a Complex World* (Cambridge: Harvard University Press, 1995), and by David Schmidtz in *Elements of Justice* (Cambridge: Cambridge University Press, 2006).
- ^{xx} . Nozick, *Anarchy, State, and Utopia*, p. 33.
- ^{xxi} . Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), chapter 6.

^{xxii} . Thomson, *The Realm of Rights*, p. 153. In this formulation the gain to nonrightholders is to be interpreted as net gain: if five nonrightholders lose if Smith's right is respected, but six other nonrightholders would gain, the total gain to nonrightholders of infringing this right is what the five would gain minus what the six would lose. In this formulation *infringing* a right is acting so that the right is not fulfilled; an infringement of a right that is morally wrong all things considered is a *violation* of a right. The terminology allows that some infringements might not be violations.

^{xxiii} . One might worry that cashing out the force of a right in terms of how much good and harm are gained and lost if the right is respected or not gives no moral weight to the antipaternalism in a doctrine of moral rights. Suppose it would not harm Arneson at all to deprive him of liberty to make some important life choice such as whether to say Yes or No to a marriage proposal. Left to his own devices, he will make the wrong choice, and if constrained, he will be better off. Here the right not to be deprived of liberty to make important life choices for oneself seems to become weightless, against the letter and spirit of a Lockean doctrine of rights. So let's interpret "harm" and "benefit" here loosely, so that one who is deprived of personal liberty for paternalistic reasons does suffer harm and is made badly off just in virtue of being treated paternalistically. We leave it to case by case judgment how strong a presumption against paternalism is thereby established.

^{xxiv} . For criticism of Aggregation, see T. M. Scanlon, *What We Owe to One Another* (Cambridge: Harvard University Press).

^{xxv} . For interpretation and criticism of Nozick's chapter four arguments, see Richard Arneson, "The Shape of Lockean Rights: Pareto, Fairness, and Consent," *Social Philosophy and Policy* 22 (2005), pp. 255-285.

^{xxvi} . Nozick, *Anarchy, State, and Utopia*, p. 50.

^{xxvii} . Shaping one's life in accordance with some overall plan looks to be neither necessary nor sufficient for achieving a meaningful life. The text gives an example in which the overall shaping is not necessary, but it is not sufficient either: consider the example of the person who arranges his life with the aim of counting the blades of grass on courthouse lawns, over and over.