

Nozick's Libertarian Theory of Justice

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In *Anarchy, State, and Utopia*, Robert Nozick sketches and motivates a libertarian theory of justice and then uses it to argue that a minimal state, but nothing stronger, can be just. In this chapter, I focus on explaining and assessing his libertarian theory. My focus will be on laying out the basics and identifying how they can be challenged. I shall not address his argument for the minimal state.¹

1. Justice

Although Nozick frequently (and confusedly) writes of (moral) justifiability, permissibility, and legitimacy, it is clear that his main focus in the book is on justice.² He never, however, explains the concept of justice. We shall therefore start by clarifying the concept of justice relevant to Nozick's theory. What is his theory about?

The term "justice" is used in many different ways by philosophers: as fairness (comparative desert), as moral permissibility (or justifiability) either of distributions of benefits and burdens or of social structures (e.g., legal systems), as enforceable duties (duties that others are permitted to enforce), as the duties that are owed to individuals (as opposed to impersonal duties, owed to no one), and as the *enforceable* duties owed to individuals. It is clear that Nozick restricts justice to the fulfillment of the duties owed to individuals, but it is unclear whether he restricts it only to enforceable duties.

For you to *owe someone a duty* is for that person to have a *claim-right* against you that

you perform, or not perform, some action. This means that you wrong that individual if you fail to fulfill that duty. As long as rights are understood inclusively, justice in the sense of duties owed to individuals is a broad topic. It covers all moral duties except those that apply independently of both the wills and interests of individuals (e.g., a duty not to eat bananas that holds even if everyone consents to eating one and it is in everyone's interest to do so). On this broad view of claim-rights, children and animals with interests can have rights, and thus can be owed duties—even if they do not have autonomous wills.

Nozick understands justice to hold just in case rights are respected.³ Rights, however, are sometimes understood merely as duties owed to the right-holder (mere claim-rights), and sometimes more narrowly as *enforceable* duties owed to the right-holder. Suppose that I owe my mother a duty to attend her birthday party, but neither she, nor anyone else, is permitted to use force against me to get me to attend. In the narrow sense, she has no right that I attend and I do her no injustice if I do not, whereas, in the broad sense, she has such a right and I do her an injustice if I do not attend. It is, as we shall see, unclear which way Nozick understands rights and hence justice.

Nozick explicitly rejects the view that all obligations, even all obligations owed to others, are enforceable (p. 91). Our question here, however, is whether all *rights*, as he understands the concept, are enforceable. In one passage, where he is arguing against the enforceability of all obligations owed to others, he seems to endorse the view that rights need not be enforceable: “Yet rights of enforcement are themselves merely *rights*; that is, permissions to do something and obligations on others not to interfere.” (p. 92). This supports the view that he thinks that one could have a right that others do something without it being permissible to enforce that right.⁴ This is, however, the only passage in *Anarchy, State, and Utopia* in which he discusses this

issue. In *Philosophical Explanations* (Nozick 1981, seven years later), he writes: “a right is something for which one can demand or enforce compliance” (p. 499). Given that demanding (e.g., verbally demanding) need not involve enforcement, this too suggests that he understands the concept of a right not to entail enforceability. Instead, it seems to consist of duties owed to one (as opposed to impersonal duties or duties owed to someone else), since those are the duties for which one can demand fulfillment. It seems, then, that rights, as Nozick understands them, are not necessarily enforceable. They are simply duties owed to the holder. Thus, if justice is respect for rights, then justice is simply a matter of fulfilling the duties owed to individuals.

Things are not, however, quite this simple. On p. 503 of *Philosophical Explanations*, Nozick writes: “Political philosophy, as I see it, is mainly the theory of what behavior legitimately may be enforced, and of the nature of the institutional structure that stays within and supports these enforceable rights.” (p. 503).⁵ His reference to enforceability suggests, again, that rights need not be enforceable (although, of course, it could simply be for emphasis). Nonetheless, given that he clearly takes justice to be a core topic in political philosophy, this passage suggests that justice is only concerned with enforceable duties owed to individuals.

In short, Nozick is not very clear on how he understands the concept of justice. Although he typically writes as if justice is a matter of respecting rights, he seems also to hold that justice is a matter of respecting enforceable rights. This is problematic, given that he seems to deny that rights are necessarily enforceable.

Overall, it seems best to interpret Nozick as understanding justice narrowly as a matter of the enforceable duties owed to individuals and to interpret his typical references to rights as references to enforceable duties owed to rightholders. This understanding makes his libertarian project more defensible, because it makes it less ambitious. His topic is not what it is morally

desirable to do, not what morality requires us to do (which may include impersonal duties), and (probably) not even what duties we owe individuals. It only concern what enforceable duties we owe individuals. Justice in this sense addresses but a small part of morality.

One further clarification of Nozick's concept of justice is needed. Is it a matter of not infringing rights or of not violating rights? A right is *infringed* just in case the boundaries that it protects are crossed without suitable authorization (e.g., permission or non-set back to the right-holders interest). A right is *violated* just in case it is infringed and there is no conclusive justification for the infringement. Thus, for example, lightly striking an individual may infringe his rights of bodily autonomy, but it may not violate these rights, if it is necessary and sufficient to save millions of lives. Infringing someone's rights can be permissible (when there is a suitable justification), but it typically leaves in place some kind of rectification duties (e.g., to apologize or compensate) that also apply in the case of violations.

Justice can be understood as non-infringement of (enforceable) rights or as non-violation thereof. Both are important topics and people use the term "justice" in both ways. Because, as we shall see below, Nozick holds that rights are absolute (with one possible exception), he denies, on substantive grounds, that rights are ever permissibly infringed. Thus, we may take him to be addressing the broader concept of justice as the non-infringement of enforceable rights.

Justice in the sense of not infringing the enforceable duties that we owe individuals, then, is Nozick's core topic. Particular theories of justice identify a specific set of rights and claim that, as a substantive matter, they exhaust the enforceable duties that we owe individuals. Below, we shall examine both the general and the specific character of the rights that Nozick invokes.

2. Near Absolute Choice-Protecting Rights

Nozick invokes a libertarian theory of rights. Before examining the specific content of these rights, we shall examine some general features of the rights he believes that we have.

Nozick holds that certain kinds of individual have certain *natural* rights. These are rights possessed in virtue of possessing some natural features (e.g., being human, or being capable of autonomous choice) that is independent of conventional (e.g., legal) or instrumental considerations (e.g., rule utilitarianism or rule contractarianism).

Rights in the broad sense can protect the choice (consent) of the right-holder, her interests (e.g., wellbeing), or both. Consider, for example, the right, against me, that I not strike your body. A standard kind of choice-protecting conception would hold that this right consists of it being wrong for me to strike your body without your valid (e.g., free and uncoerced) consent. The right protects your choices (or will) in the sense that the protection can be waived by your valid consent (as you might do to participating in a friendly boxing match). By contrast, a simple kind of interest-protecting conception of the right, against me, that I not strike your body holds that this right consists of it being wrong for me to strike your body when it is against your interests. The right protects your interests in the sense that the constraint against striking you does not apply when it is in your interests (e.g., when the only way to prevent you from being hit by a car is to push you out of the way).

Conceptually, rights in the broad sense can be choice-protecting, interest-protecting, or both. Nozick, however, assumes, as a substantive matter, that we have choice-protecting rights. Indeed, he never even considers the possibility of rights being interest-protecting. This is not surprising, since the choice-protecting conception is the most familiar one, and the contrast between the two conceptions has been significantly developed since Nozick wrote the book. (For

a superb analysis, see Kramer, Simmonds, and Steiner, 1998.)

Nozick addresses the question of what kinds of rights we have by asking (p. 48): “What are constraints based on?” This is a somewhat confusing way of asking about rights, since moral constraints need not be grounded in rights. Conceptually, there can be impersonal constraints, which are constraints that apply even when everyone consents and benefits (e.g., a constraint against killing humans no matter what). Nozick’s answer, however, makes reasonably clear that he is focusing on rights-based constraints. He suggests that moral (rights-based) constraints are based on some combination of the right-holder being rational, having a free will, being capable of guiding its behavior by moral principles, and having “the ability to regulate and guide its life in accordance with some overall conception [of its life] it chooses to accept” (pp. 48-49).

Simplified, this boils down to the requirement for some kind of autonomous agency. Some such requirement underlies the choice-protecting conception of rights, but it is not an essential part of the interest-protecting conception. For the latter, the requirement is some kind of capacity for interests (e.g., wellbeing). On the interest-protecting conception, mammals and infants are possible right-holders even though they have no capacity for autonomous choice.

If Nozick is to defend a theory of justice in the broad sense, he cannot simply assume that rights protect autonomous choices. He needs to argue, on substantive grounds, that there are no interest-protecting rights. This, however, he does not do.⁶ This, then, is one limitation of his argument. Nozick could, of course, retreat simply to defending a theory of justice in the narrow sense of choice-protecting rights, but this would rob his argument of considerable generality.

Nozick takes a stance on a second issue about rights: whether basic rights (such as the right against aggression) are absolute (conclusive and unconditional), conditionally conclusive (conclusive, but only under certain conditions), or pro tanto (having some weight but can be

overridden by countervailing considerations). He claims that the rights that we have are almost absolute (conclusive either unconditionally or almost so). He leaves open the possibility that rights can be permissibly infringed in order to avoid cases of “catastrophic moral horror” (footnote, p. 30).

Nozick supports this view by rightly claiming that “Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means;” (pp. 30-31). This is compatible with an interest-protecting conception of rights. Far more controversial, however, is his associated claim that “they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable” (p. 31). This not only presupposes a choice-protecting conception of rights, it also assumes that rights are absolute. It is possible, however, for rights to provide strong *pro tanto* protection to individuals (e.g., never overridden by non-rights considerations) without that protection being absolute. Protection of other people’s rights may sometimes take precedence. For example, it may be permissible for me to take your gun without your permission in order to protect ten innocent people from being killed by a murderer.⁷

In a related vein, Nozick claims: “The root idea, namely that there are different individuals with separate lives and so no one may be sacrificed for others, underlies the existence of moral side constraints.” (p. 33). Again, we can agree that the fact that individuals have separate lives, with the capacity for wellbeing, provides good reason for thinking that they have some kind of rights protecting their lives. Hedonistic utilitarianism, for example, is mistaken in holding that all that matters is some social aggregate (e.g., total happiness). The distribution of wellbeing *to individuals* and other features matter. This, however, does not require that individuals have rights that are absolute or nearly so. They might simply have rights that are

conclusive but highly conditional. Or the rights might be relatively strong pro tanto considerations. The separateness of persons can be recognized in a variety of ways, and appeal to absolute rights is only one very strong such way. Nozick is correct that: “[T]here is no social entity with a good that undergoes some sacrifices for its own good. There are only individual people, different individual people, with their own individual lives.” (pp. 32-33). This, however, does not establish that rights are absolute.

3. Entitlement Theories

So far, we have addressed the concept of the justice of actions. Justice is also, however, applied to states of affairs (e.g., distributions of goods) and to institutions (e.g., the state). Because we are not here addressing Nozick’s arguments about the justice of the state (or other institutions), we shall focus on his views about the justice of states of affairs.

As a substantive matter, Nozick implicitly assumes *proprietaryism*, the view that all enforceable moral rights are moral property rights (rights over things). The justice of a state of affairs is, on this view, a matter of whether individuals have a right to their holdings (the objects in their possession broadly understood): “The complete principle of distributive justice would say simply that a distribution is just if [presumably: and only if] everyone is entitled to the holdings they possess under the distribution.” (p.151).⁸ Although proprietaryism is a controversial view, Nozick does not defend it.

More specifically, Nozick invokes an *entitlement theory* of justice, a particular kind of proprietary theory, specified by the following kinds of principle:

1. Justice in Acquisition: Principles specifying the conditions under which an individual can come to have rights over a previously unowned thing.

2. Justice in Transfer: Principles specifying the conditions under which an individual having rights over a thing can transfer those rights to another.
3. Justice in Rectification: Principles specifying how the rights of people change in virtue of a past injustice (rights-infringement).

One puzzling aspect of this schema is that it does not explicitly mention anything about *preventive justice*. What rights do individuals have to prevent others from violating their rights? For example, does an innocent person have a liberty-right to kill a person attempting to kill her? To cover these issues, which Nozick clearly intends to cover, let us, lump preventive justice with rectificatory justice. The third principle thus becomes:

- 3*. Justice in Prevention and Rectification: Principles specifying how the rights of people change in virtue of a past, present, or future injustice (rights-infringement).

A second puzzling feature of this schema is that it makes no mention of the *initial rights* that individuals may have prior to acquisition and transfer. A very natural thought is that individuals typically have certain rights over their bodies (e.g., a right not to be killed or struck). How does this fit in Nozick's schema? One possibility is that these rights are acquired through the relevant acquisition or transfer procedures, but this seems implausible. Rights over one's body do not seem to depend contingently upon engaging in whatever actions are required for acquisition or transfer. Instead, it seems that individuals start their lives (at some suitable point) with these rights. They seem to be initial rights.

Nozick was probably focusing on rights over external objects (non-persons), and for this

purpose it is quite plausible that there are no initial rights over such things. It's reasonably clear that he was implicitly assuming that individuals have certain initial rights (e.g., over their bodies). Let us therefore add a fourth kind of principle to the entitlement theory schema:

0. Initial Justice: Principles specifying the initial rights that individuals (of certain sorts) start with.

On entitlement theories, then, individuals start with certain rights, acquire rights in previously unowned things, transfer some rights to others and receive some rights from others, and lose or acquire some rights to rectify any past injustices. This is very schematic and can be filled in many ways. Nozick, we shall see, fills it in with a libertarian theory. First, however, let us consider the procedural nature of entitlement theories.

4. Procedural Theories of Justice

Justice, on an entitlement theory, is past-regarding in that the rights an individual has depends on what the past was like (who acquired what, who transferred what, who violated whose rights, etc.). Nozick is surely correct that what moral rights one has depends on what the past was like. For example, whether I have a moral right to a certain car in my possession depends on what the past was like. If you were the rightful owner, and I validly purchased it from you, then I have a right to the car. If, on the other hand, I simply stole it from you, then I do not.

Entitlement theories are, however, past-regarding in a very specific way. They are *purely procedural theories of justice* in the sense that they hold that "A distribution is just if it arises from another just distribution by legitimate means. The legitimate means of moving from one

distribution to another are specified by the principle of justice in transfer [and the principles of acquisition, and prevention/rectification]. ... Whatever arises from a just situation by just steps is itself just.” (p. 151; see also pp. 207-208). A purely procedural theory of justice derives the justness of distributions from the justness of the prior situation and the justness of the steps taken from it (with special procedures required to restore justice when an unjust step takes place.)⁹

Nozick defends entitlement theories by appealing to his famous Wilt Chamberlain example (pp. 160-64), which is intended to show that theories that are not purely procedural involve unacceptable continual interference with people’s lives.¹⁰ Suppose that everyone starts with a just initial set of holdings (on one’s preferred theory of justice, say equality of some sort). Now suppose that Wilt Chamberlain, a famous basketball player, agrees to play basketball in return for 25 cents from each spectator and the spectators voluntarily agree. Suppose that, over the course of the season, a million fans voluntarily purchase tickets and there are no other financial transactions. Chamberlain now has (at least) \$250,000 more than each of the fans. Whatever non-purely-procedural principle of justice was invoked for the initial holdings (egalitarianism, utilitarianism, desert theory, etc.), it would only be by accident if it were still satisfied. Thus, if justice is to be maintained, there must be continual redistribution among individuals. This, Nozick claims, is implausible. Given that the distribution arose from the voluntary choices that individuals had with respect to resources that they were, by assumption, entitled to control, how could the result be unjust? Moreover, such redistribution involves continual interference with people’s lives, and it seems implausible that justice would require this. Nozick concludes that principles of justice that are not purely procedural must be rejected.

Do theories of justice that are not purely procedural necessarily require continual interferences with people’s lives in some empirical (non-moral) sense? They do require at least

some occasional interference, but the real question is whether non-procedural theories require *significant* continual interference with people's lives. Some certainly do. For example, a theory that requires equal wealth *at all times* would be continually adjusting people's wealth levels, sometimes in significant ways. Non-procedural theories, however, need not (as Nozick recognized, p. 164) be concerned with *difficult to achieve* states (such as maximal equality) *at each time*. Consider a principle that holds that justice requires that each person have *enough annual income for basic subsistence*. Under moderate abundance, if people start with a just share, this will not require frequent significant adjustments to the distribution.¹¹

Moreover, even entitlement theories involve continual interference with people's lives. Those who are not entitled to given resources are threatened with punishment if they use them without permission, are prevented from doing so if they attempt to do so, and are punished if they do so. The real issue for Nozick, I think, is, not interference with people's lives but rather, the idea that, if one has certain (e.g., initial) rights over certain resources and one exercises them in a way that respects the rights of others, then the result must be just (and interference unjust). Let us explore that issue.

To start, note that, almost any principle of justice (e.g., utilitarian or egalitarian) can be used as the basis for a purely procedural (or starting-gate) theory of justice. One simply applies the principle to determine initial shares and then allows unrestricted transfers after that. For example, the initial holdings (assuming unrestricted transfer rights) may be divided up to efficiently promote expected equality of wellbeing (e.g., giving Wilt a much smaller share of the non-human assets to offset his superior human assets). The Wilt Chamberlain example has no purchase against such theories.

Of course, unrestricted transfers *by gift* are problematic in the context of *multiple*

generations. Unrestricted gifts (including bequests) will prevent individuals from starting at the desired starting position (e.g., equal opportunity for wealth or wellbeing). Because Nozick's Wilt Chamberlain example involves only market transfers, and not gifts, it is compatible with significant taxation of gifts to equalize (for example) the starting positions of non-initial generations. That, however, would miss Nozick's real point, which is that there should be no restrictions on voluntary transfers generally. That may be plausible in the single generation case, and it may even be plausible generally for market (rather than gift) transfers. It's much less clear, however, that there should be no restriction on gift transfers in the multiple generation case.¹²

Suppose, however, that we accept that there are no restrictions on voluntary transfers and therefore restrict our attention to entitlement theories that impose no such restrictions. If I have some rights over a given resource, and I have and exercise the unrestricted moral power to transfer it to you, does it follow that you *fully own* the resource? It does not. I may not fully own the resource to start with, and the rights that I transfer to you may not be sufficient to give you full ownership. For example, if there is a public right of way on my land (and hence I have less than full ownership of the land), you do not acquire full ownership of the land when I transfer my ownership to you. The key question here concerns the content of the initial rights that individuals have and of the moral powers they have to appropriate (acquire rights over previously unowned resources). If the initial rights are limited in various ways, or the rights that can be acquired through appropriation are also limited, then rights that can be acquired through unrestricted transfer may also be limited.¹³

To make this concrete, suppose that the initial rights people have and the rights that they can acquire through appropriation are always conditional on the holder not possessing more than 150% of the per capita market value of resources. The excess share, let us suppose, belongs to

the king. A million people below this benchmark may consensually transfer the conditional right to 25 cents to Wilt Chamberlain. The transfer is consensual and thus fully valid. What is transferred, however, is a conditional right (since that is all that was initially possessed), and, if Wilt Chamberlain ends with more than 150% of a per capita share of wealth, his excess share belongs to the king, and not to him. Justice thus requires a redistribution of holdings (although not of rights).

In sum, even if consensual transfers of rights are unconditionally justice-preserving (and they are not on some possible entitlement theories), the rights so transferred need not be unconditional. They may be subject to on-going limitations. As a result, even though consensual transfers are perfectly valid, that does not entail that the resulting distribution of holdings is just. The on-going limitations may require a redistribution. Indeed, something like this, we shall see, is true on Nozick's own libertarian theory. Let us, finally, turn to that.

5. Libertarian Rights

Nozick invokes the following libertarian version of the entitlement theory:

- (1) Justice in initial rights: Each agent initially has full control-ownership of her person.
- (2) Justice in acquisition: Each agent who claims control-rights in unowned resources and mixes her labor with them (or something like that) has those rights over the resources to the extent compatible with a Lockean proviso that enough and as good be left for others.
- (3) Justice in transfer: If an agent has certain rights over a resource, and she validly (e.g., without force or fraud) consents to the transfer those rights to someone else, then the other person acquires those rights, if (a) the other person validly consents to the acquisition, and (b) the transfer satisfies the Lockean proviso.

(4) Justice in prevention and rectification:

(a) An agent who violates the rights of another owes her compensation for the loss of wellbeing from the violation.

(b) An agent is permitted to use suitable force, and to authorize others to use such force, to prevent another from violating her rights.

(c) All agents have some kind of right (either individually or jointly) to punish those who violate rights.

We shall examine each of these principles carefully below.

5.1 Justice in Initial Rights: Control Self-Ownership

Nozick endorses:

Justice in initial rights: Each agent initially has full control-ownership of her person.

Although libertarianism is generally taken to be committed to the thesis that agents fully own themselves, Nozick uses the term “self-ownership” only once in the entire book (p. 172, in his discussion of taxation and forced labor). As we shall see, however, it’s clear that he means to endorse at least full *control* self-ownership. (Here and below, I assume a choice-protecting conception of rights for illustration.)

Self-ownership is simply a special case of ownership. It is the case where the owner and the thing owned are one and the same. We can thus start with the general notion of *control* ownership of a thing, which is at the core of *full* ownership of that thing (p. 171). The other

incidents of full ownership are the rights of transfer, rights to prevent and rectify violations, and immunities to loss. Control ownership, like ownership generally, can take stronger or weaker forms, but I shall focus on full control ownership (the strongest form). Control-ownership of a thing consists of (1) the claim-right, against all others, that they not use the object without one's valid consent, (2) an unrestricted liberty-right, against all others, to use the object (no one else's permission is needed), and (3) the moral power (a kind of right), against all others, to authorize the use of the object (no one else's permission is needed). Full control-ownership of a thing does not mean that one is permitted to use it in any way one wants. Using the baseball bat one fully owns to smash someone's head is not permitted, but this is because it violates the other person's rights (e.g., to her body)—not because using the bat as such was wrong (as it would be if it belonged to someone else).¹⁴ (See pp. 171-73, 281-82.)

Nozick does not use the term "control self-ownership", but he claims that the fact that individuals have separate existences leads to the libertarian constraint against aggression (p. 33). He never explicitly clarifies what counts as aggression, but it clearly includes use of another's person (e.g., body) without her valid consent (e.g., rape, assault, homicide). He also holds that individuals are entitled to their natural talents (their natural personal endowments; p. 225). Although this is not conclusive, it seems reasonable to hold that Nozick is committed to at least full control self-ownership.

Control self-ownership reflects the separate existences of individuals. It gives individuals special rights of control over the use of their person. Most people accept it as at least a pro tanto principle. Nozick, as we have seen, accepts it as an almost-absolute principle. Indeed, except for the one footnote on p. 30 (where he leaves open the possibility that the infringement of rights may be permissible where necessary to avoid catastrophic moral horror), Nozick writes as if the

all rights are absolute. For brevity, I shall write as if he is committed to the absoluteness of the rights he invokes and leave the possible qualification implicit.

While *pro tanto* control self-ownership is relatively uncontroversial, absolute control self-ownership is highly controversial and rejected by most. It has two problematic implications. Suppose that the only way to save a thousand lives is to remove one of one's hairs to produce an antidote to a fatal disease afflicting them. Control self-ownership says that (1) one is at liberty not to remove any hairs (i.e., one owes no one a duty to do so) and (2) one has a claim-right that others not remove any of the hairs (without one's permission). This is very plausible as a *pro tanto* consideration that may be overridden by stronger countervailing considerations, but it's intuitively implausible that this liberty and claim-right are absolute.

The force of the above objection can be softened if one grants that agents have some initial duties to aid others and only insists that these duties are not enforceable. This involves rejecting the moral liberty that is part of control self-ownership, but it maintains the right against interference even when one fails to provide the required aid. This response softens the first objection, but does not eliminate it, since many hold that we have enforceable duties to aid others. Moreover, this response does not address the second objection (the duty of others not to remove one of your hairs without your permission).

A more general response to the above objection, involves (1) pointing out the radical implications of recognizing an obligation to aid others, or a liberty of others to use one's person for such purposes, even in the special cases where the benefit to them is great and the cost to one is small (since life is full of such situations); (2) appealing to a very strong normative separateness of persons; (3) insisting on *initial* full control self-ownership, but allowing that individuals can lose some of their full control self-ownership in virtue of their use or

appropriation of natural resources (discussed below); and (4) insisting that, although it has some counterintuitive implications (like all robust principles), its theoretical plausibility more than offsets them. Although I believe that something like this is plausible, I shall not pursue it here.

5.2 Justice in Acquisition: Appropriation Subject to the Lockean Proviso

Nozick endorses:

Justice in Acquisition: Each agent who claims control-rights in unowned resources and mixes her labor with them, or something like that, has those rights over the resources to the extent compatible with satisfying a Lockean proviso that enough and as good be left for others.

Almost all libertarian theories hold that one can acquire property rights over an unowned thing as long as one performs an appropriate action with respect to that thing and certain provisos are satisfied. Different versions differ in their specifications.

Three general points should be kept in mind about the conditions on acquisition. First, one acquires rights over a resource, when one performs a suitable action (e.g., labor mixing), only when that object is *unowned*. Mixing my labor with your Cadillac by washing its windows without your permission does not give me any rights to your car. Second, even if, say, labor-mixing is required, one presumably must also *claim* (e.g., by some public act) rights over the object to acquire them. Merely clearing a space in the forest to sleep for a night during a trip doesn't automatically make you the owner. Third, the ownership of things acquired by acquisition need not be, and is probably rarely, *full* ownership. This is both because some rights

over a resource may have already been claimed by others (e.g., there may be an established right-of-way on some land that someone appropriates) and because the appropriator may not claim all the available rights (either because she does not want them or she did not think to claim them). The strength of property rights in external things (other than persons) is thus historically contingent.

Nozick doesn't take a firm stance on what kind of action is needed with respect to the resource. He focuses on labor-mixing (Locke's view), finds it problematic, but never endorses an alternative. The main problem that Nozick identifies is that of determining the boundaries of the "object" with which one mixes one's labor: "If an astronaut clears a place on Mars, has he mixed his labor with (so that he comes to own) the entire planet, the whole uninhabited universe, or just a particular plot?" (p. 174). (Note that first occupancy/possession theories have similar problems.) Nozick offers no answer to this question. A more plausible approach, I think, is to drop the labor-mixing requirement and simply require that the individual publicly *claim* rights over of a specified (delimited) set of resources. In any case, we shall, following Nozick, assume that some solution has been found for determining the boundaries of the object to which one acquires rights.

Let us turn now to what kind of proviso limits the acquisition of rights over unowned resources. *Radical right-libertarianism* (e.g., Narveson 1988, ch. 7 and 1999 p. 118, and Rothbard 1978 pp. 31-36) imposes no proviso. The first person to mix her labor (or: occupy, possess, discover, or claim) with a resource comes to own it. This, however, is implausible. Prior to someone's acquisition of ownership of a given unowned resource, others are at liberty to use it (e.g., walk on a path). Although it may be plausible that they can be deprived of this liberty when it does not disadvantage them, it is not plausible that they can always be so deprived when it

disadvantages them.¹⁵ Nozick agrees (p. 175), and following Locke (1690, ch. 5), he imposes a proviso that “enough and as good be left for others”. Nozick (pp. 174-82) interprets this proviso as requiring that no one be worse off (in wellbeing) than she would be if the resource remained unowned.¹⁶

Nozick is surely right that his version of the Lockean proviso is a necessary condition for acquisition of rights over unowned things. It is, however, arguably too weak to be the only necessary condition. As he himself asks, “Why should one’s entitlement extend to the whole object rather than just to the *added value* one’s labor has produced?” (p. 175). Nozick dismisses this question in a single sentence by claiming “No workable or coherent value-added property scheme has yet been devised, and any such scheme presumably would fall to objections (similar to those) that fell the theory of Henry George [a 19th century left-libertarian].” (p. 175). There is, however, no problem in principle here. One can allow that the appropriator obtains rights over the entire object, but insist that this is conditional on her paying back to the members of society the competitive value (based on supply and demand; e.g., based on an auction or a competitive market) of the rights she has claimed over the resource in its *unimproved* state. This leaves the appropriator any profits or benefits that she can reap from the improvements (valued added). Obviously, the details need to be worked, but there is no problem in principle. Moreover, although the ideas of Henry George (like all moral theories) are controversial, they have not been decisively refuted.¹⁷

Within libertarianism, there are many possible views about how strong a proviso there is on acquisition. As we saw above, radical right-libertarianism rejects any proviso. The first one to perform the relevant action (e.g., labor-mixing) acquires rights over the resource, with no constraints on how others are affected. Nozick imposes the weak constraint that no one be made

worse off than if the resource remained unowned. There are at least two more egalitarian provisos. *Equal share left-libertarianism* imposes the proviso that one leaves enough for others to have an equally valuable (e.g., in terms of financial value) share. *Equal opportunity for wellbeing left-libertarianism* imposes the proviso that one leave enough for others to have an equally valuable opportunity for wellbeing (and thus requires that larger shares be left for those whose opportunities for wellbeing are otherwise limited).¹⁸ In short, the proviso that Nozick adopts on appropriation is but one of several live possibilities. Much more argument is needed to establish his version of libertarianism.¹⁹

It's worth noting that, whatever the content of the proviso is (as long as it's not empty), a plausible version would allow the appropriator to keep any excess share as long as she pays back to others the competitive (e.g., financial) value of the excess share. This debt, which could take the form of a periodic rental payment rather than a one-time lump sum payment, could provide the basis for wealth taxation of rights over natural resources.

Before turning to Nozick's views on justice in transfer, we need to address one final aspect of the proviso: Does it apply only at the time of appropriation or is it an on-going limitation on the property rights involved? Nozick is clear that it is the latter:

Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation. This excludes ...his using it in a way, in coordination with others or independently of them, so as to violate the proviso by making the situation of others worse than their baseline situation. ... Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for

his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights. Once it is known that someone's ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) "his property." (p. 180).

I believe that Nozick is exactly right about this. Whatever the proviso is, it is not a one-time test (at the time of appropriation); it is an on-going limitation. Thus, the ownership in external objects is never full. It is always subject to the restrictions imposed by the proviso. It may be satisfied at one time but not at a later time. This point, I believe, has not been adequately appreciated in the literature. It's often supposed that the proviso is merely a one-time condition.²⁰

5.3 Justice in Transfer: Full Transfer Rights

Nozick endorses:

Justice in Transfer: If an agent has certain rights over a resource, and she validly (e.g., without force or fraud) consents to the transfer those rights to someone else, then the other person acquires those rights, if (a) the other person validly consents to the acquisition, and (b) the transfer satisfies the Lockean proviso.

Nozick does not explicitly state that the valid consent of the transferee is required for the validity of a transfer, but he surely intends it be present. One does not acquire property rights merely because someone else decides to transfer them to one. One must accept the transfer. Nor does Nozick explicitly discuss what is required for *valid* consent, but it's clear that he requires

something like the absence of force and fraud.

Nozick believes that same proviso that applies to acquisition also applies to transfers:

A theory which includes this proviso in its principle of justice in acquisition must also contain a more complex principle of justice in transfer. ... If the proviso excludes someone's appropriating all the drinkable water in the world, it also exclude his purchasing it all. (p. 179)

Nozick is, I believe, confused here. Once he recognizes (as indicated above) that the proviso is an on-going limitation on acquired rights, there is no need for that proviso also to apply to transfers. If others have appropriated certain resources, those rights are limited, on an on-going basis, by the proviso. When they transfer them to you (e.g., by gift or sale), the rights you acquire are also so limited. There is no need for the acquisition proviso to apply to transfers. (Note that the proviso applies only to rights initially acquired through appropriation. There is no proviso, within libertarian theory, on initial self-ownership and thus there is no proviso restricting the transfer of such rights.)

Justice in Transfer claims that all rights are fully transferable. This is not a conceptual truth. One can have control rights over an object (e.g., a rented apartment, or a primogeniture estate) without having any rights to transfers those to others. Still, if one fully owns an object, this includes full transfer rights. This is roughly Nozick's idea.

If the rights of *self-ownership* are fully transferable, then one can transfer ownership of oneself to someone else (by gift or sale) and thereby become her slave. Nozick clearly believes that individuals have such rights. He explicitly says that they do (p. 331), and his discussion of

people selling shares in themselves (pp. 281-87) implicitly presupposes that they do. *Involuntary* enslavement, of course, is a gross violation of full self-ownership, but *voluntary* enslavement is something that full self-ownership allows. Intuitively, of course, this seems problematic.

If one thinks that a main concern of justice is to protect the *having* of effective autonomy, or to *promote* the having, or exercising, of effective autonomy, then voluntary enslavement will indeed seem problematic. On the other hand, if one thinks that a main concern of justice is to protect the *exercise* of autonomy, it is not. A well-informed decision to sell oneself into slavery (e.g., for a large sum of money to help one's needy family) is an exercise of autonomy. Indeed, under desperate conditions it may even represent an extremely important way of exercising one's autonomy. The parallel with suicide is relevant here. In both cases an agent makes a decision that has the result that she ceases to have any moral autonomy and thus ceases to exercise any. In both cases it will typically be one of the most important choices in the agent's life. I would argue that, assuming no conflicting commitments, protecting the agent's *exercise* of her autonomy in such a case overrides any concern for protecting or promoting her *continued possession* of moral autonomy. One has the right to choose to cease to be autonomous (by dying or by losing rights of control). Thus, genuine voluntary enslavement is arguably not problematic. It is simply the limiting case of the sorts of partial voluntary enslavement that occurs when we make binding commitments and agreements (e.g., to join the military).²¹

Before concluding, let us briefly consider Nozick's claims about rights to prevent and rectify rights violations.

5.4 Justice in Prevention and Rectification

Nozick endorses:

Justice in Prevention and Rectification:

- (a) An agent is permitted to use suitable force, and to authorize others to use such force, to prevent another from violating her rights (pp. 127-30).
- (b) An agent who violates the rights of another owes her compensation for the loss of wellbeing from the violation (pp. 135-37).
- (c) All agents have some kind of right (either individually or jointly) to punish those who violate rights (pp. 135-42).

Nozick's discussion of these issues is very schematic and leaves a wide range of important issues unresolved. Still, almost everyone will agree that individuals have some rights to prevent the violation of their own rights (although there will be disagreement about the exact content of those rights). His claim that individuals have rights to compensation is more controversial, but I believe that he is correct on this (although again the devil is in the details). I shall not, however, pursue these issues here.

The claim that individuals, either individually or collectively, have a right to *punish* wrongdoers is controversial, even among libertarians. Many libertarians (e.g., Rothbard 1982 and Barnett 1977, 1980, 1998) would argue that rectification rights are limited to the extraction of compensation for wrongful harm. Sometimes, punishment may be necessary part of compensation (e.g., where it is the only way of minimizing the harm to the victim), but where it is not, some libertarians would argue that there is no right to punish. The crude idea is that even wrongdoers maintain some of their rights of self-ownership. Although harming them is permissible where necessary to reduce their wrongful harm to others, it is not permissible if it

benefits no one (as with purely retributive punishment). I believe that this view is correct, but I shall not pursue it here. I merely flag it as one more issue left unresolved by Nozick.²²

Because of the indeterminacy of full ownership with respect to the prevention and rectification rights (and the corresponding immunity to loss of rights), there is room within libertarian theory for radically different views. Nozick sketches a framework, but the hard work is in articulating and defending a specific set of rights.

6. Conclusion

Nozick argues (1) that a non-consensual minimal state can, if it arises in the right way, be just (violate no one's rights) and (2) that no stronger form of a state can be just. His argument is based on the assumption that individuals have the libertarian rights that we have discussed. Whether his argument is successful if individuals do have such rights is a topic that will be discussed in other chapters.

Nozick does not fully articulate his libertarian theory nor adequately defend it. Still, the book is full of stimulating examples and important ideas for moral theory. It was clearly a major impetus for others to explore more systematically the core ideas. There are many ways of contributing to philosophy and this is surely one of them.²³

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Notes

¹ For superb introductions to Nozick's book, see Wolff (1991) and Bader (2010).

² Some of the many references to permissibility, justification, or wrongness occur on pages ix, xi, 36, 38, 114, and especially 52. References to legitimacy occur, for example, on pp. 52, 134, 232, and 333.

³ Some of the many references which at least implicitly restrict justice to respect for rights occur on pages ix, xi, 6, 12, 13, 23, 28, 114, and 149.

⁴ In discussing this passage, Steiner (1981, 1982), Miller (1981), and Wilson (1981) each agree that Nozick is denying that rights are necessarily enforceable, although they disagree about whether he is right about that. For general discussion of whether rights must be enforceable, see Kramer, Simmonds, and Steiner (1998).

⁵ For a similar comment, see p. 6 and p. 32 of *Anarchy, State, and Utopia*.

⁶ Nozick has some puzzling comments on the status of animals. He claims, in passing, that it is normally unjustified (wrong) for contemporary Americans to eat animals (p. 38). This is because higher animals morally count for something (p. 35). Indeed, higher animals have *claims* to certain treatment (p. 39). Presumably he holds that animals do not have any enforceable claims.

⁷ Thompson (1977) argues against the view that all rights are absolute.

⁸ Davis (1976), p. 346, suggests that there is a problem with the principle as formulated. Suppose we are all entitled to our holdings and then I steal *and destroy* some of your property. It seems that each person is still entitled to his holdings (since I no longer possess your property). This, however, is a mistake, if, as seems plausible, I owe you compensation for the harm. For then I am in possession of some property to which I am not entitled.

⁹ Purely procedural justice, in the sense used here, is different from what Rawls (1971, p. 86) means by the same phrase. He means that there is a procedure for which whatever it generates is just. He does not presuppose that the antecedent situation, in which the procedure is in applied, was just.

¹⁰ Nozick presents his argument as being against end-state theories of justice (i.e., theories that do not recognize differential deserts or claims based on past actions) and patterned theories of justice (i.e., that call for certain distributions, such as equality or in proportion to desert). His distinctions, however, are somewhat confused and not very useful. His real target is theories that are not purely procedural.

¹¹ Here and below, I draw on Becker (1982) and Fried (1995). See also Cohen (1977, 1995, 2009).

¹² Scanlon (1976) makes this point.

¹³ Nozick's implicit assumption that the initial rights and appropriated rights are full (unrestricted) rights of ownership is noted, for example, by Nagel (1975), O'Neill (1976), Ryan (1977), and Cohen (1995).

¹⁴ For more detailed discussion of the notion of full ownership, see Vallentyne, Steiner, and Otsuka (2005). For discussion of control ownership, see Christman (1994).

¹⁵ For elaboration, see, for example, Vallentyne (2007).

¹⁶ On p. 177, Nozick ask whether the situations of others is "worsened by a system allowing appropriation and permanent property", but this, I think, was just a slip on his part. The justice of actions on his view is based on their specific features and not on general features of some (perhaps non-existing) system.

¹⁷ For a defense of George’s ideas against economic criticisms, see, for example, Gaffney and Harrison (1994).

¹⁸ Steiner (1994) defends equal share left-libertarianism, whereas Otuska (2003) and Vallentyne (2009) defend equal opportunity for wellbeing left-libertarianism. For a collection of historical and contemporary writings on left-libertarianism, see Vallentyne and Steiner (2000a, 2000b).

¹⁹ Here, I make the standard assumption that the proviso only applies to appropriation. Eric Roark (2008), however, has plausibly argued that the proviso also applies to acts of mere use (without appropriation). Mack (1995) rejects any special proviso on appropriation, but he agrees that there is a general (although weak) proviso on use.

²⁰ Becker (1982) clearly brings out the significance of the on-going nature of the proviso.

²¹ For further defense for the right of voluntary enslavement see: Nozick (1974, p. 331), Feinberg (1986), ch. 19, Steiner (1994, pp. 232-34), and Vallentyne (1998, 2000).

²² I here note one other problematic feature of Nozick’s theory of justice in prevention and rectification. In his argument for the possible justness of the minimal state, he claims (pp. 96-108) that the dominant protection agency does not violate rights of non-clients when it prohibits—and uses force to stop—they from using enforcement procedures against its clients that it deems unfair or unreliable (provided that it provides them appropriate compensation). This seems quite mistaken. If a client wrongfully attacks a non-client, what matters is whether the defense is in fact necessary and proportionate. What “procedure” is used and whether someone else deems it unfair or unreliable is irrelevant. For elaboration, see Vallentyne (2006).

²³ For helpful comments, I thank Ralph Bader, Xiaofei Liu, Eric Roark, Brandon Schmidly, Alan Tomhave, Patrick Tomlin, Jon Trerise, and the members of the audience at the Reappraising

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