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Author(s): Thomas Scanlon

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THOMAS SCANLON

## Nozick on Rights, Liberty, and Property

In *Anarchy, State and Utopia*<sup>1</sup> Robert Nozick approaches political philosophy within a framework which at first sight seems both familiar and congenial to contemporary liberal thought. It is a framework which emphasizes individual rights and the derivation of political obligation from consent. The conclusions of the book, however, are liberal in the nineteenth-century sense of the term. Nozick holds that the only legitimate state is the minimal state, whose activities are confined to the protection of individuals and their property and to the enforcement of contracts. This state is unique among social organizations in having the right to force residents to pay for its services whether or not they have consented to do so. Citizens may band together for whatever other purposes they may desire—to provide education, to aid the needy, to organize social insurance schemes—but such schemes must be purely voluntary, and the state must enforce anyone's right not to be compelled to contribute to them.

Nozick reaches these conclusions by adhering as closely as possible to the idea that, in economic life as in politics, all valid obligations derive from consent. Of course, consent alone cannot be theoretically basic. Something must determine the conditions under which acquiescence counts as morally binding consent. In addition, the obligations and entitlements one person acquires through voluntary agreements can affect the alternatives open to others who have not been parties to

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1. (New York, 1974). Page numbers in the text refer to this book.

these agreements. Something must determine when such side effects make an agreement void. In Nozick's theory these conditions and limits are set by a skeletal framework of rights derived from Locke. The minimal role allowed to the state and the great scope left to voluntary agreement and consent in his theory are direct consequences of the particular character of these rights. This system of rights is not argued for directly in the book, however, and Nozick does not claim to have given these rights a foundation (p. 9). The impact of the book and the support it offers to Nozick's view derive mainly from a series of challenging questions, engaging examples, and theoretical devices designed to make his conceptions of rights and justice intuitively appealing and to make alternative views appear untenable. I will therefore begin by considering a number of these examples, returning later to the framework of rights and its Lockean pedigree.

The central theoretical device of the book is the classification of principles of justice as "historical," "end-state," and "patterned." Nozick classifies a principle of justice as historical if that principle makes the justice of a distribution depend on how it came about (p. 153). It will follow from a historical principle of justice that "past circumstances or actions of people can create differential entitlements or differential deserts to things" (p. 155). By contrast, under what Nozick calls an end-state principle, the justice of a distribution will depend only on certain structural features of the situation it represents, for example, on the amount of utility produced or on the degree of equality obtaining. Of course, the structural features of a distribution that are deemed relevant by a principle of justice might make reference to historical events. A principle might require, for example, that people's holdings should be proportional to their moral worth as determined by their past actions. Such a principle is historical in Nozick's sense, but it clearly has a great deal in common with end-state principles. Nozick calls such a principle, one which specifies that holdings are to "vary along with some natural dimension" or some combination of such dimensions, a patterned principle. Nozick's own theory of justice is based on unpatterned historical principles. This theory is an entitlement conception of justice. Such a conception is specified by three components: a principle of (initial) acquisition, a principle of trans-

fer, and a principle of rectification. Its central tenet is that any configuration of holdings that results from the legitimate transfer of legitimately acquired holdings is itself just. There is no reason to expect (or to require) that such holdings conform to any natural pattern. (The principle of rectification comes into play to explain how, if holdings are affected by violations of the principles of just acquisition and transfer, this situation is to be remedied.)

Many theories of justice, almost any theory perhaps, will give some role to considerations of entitlement; that is, they will recognize some processes as conferring legitimacy on their outcomes. What is special about Nozick's view is that it makes entitlement principles the beginning and end of distributive justice. While his principles are not described in detail, it appears that his theory differs from other pure entitlement conceptions chiefly in admitting fewer restrictions on the acquisition and exchange of property. He mentions only one such restriction, called "the Lockean Proviso," which provides that any acquisition, transfer, or combination of transfers is void if it leaves third parties worse off than they were in the state of nature.<sup>2</sup> Such a worsening might occur, for example, if someone were to buy, in simultaneous secret transactions, rights to all the available sources of water. This restriction could be substantial were it not for the fact that the baseline for its application is set by conditions in the state of nature. According to Nozick the productivity of the capitalist system in improving our material condition makes it unlikely that (in a competitive economy) anyone could acquire holdings that would leave others below this standard.

Nozick clearly feels that the distinction between historical (unpatterned) principles of justice and patterned or end-state principles is of fundamental importance. He emphasizes that almost all of the principles of justice commonly offered are end-state or patterned principles and, as such, are clearly mistaken. If this were correct it would indeed be important. Certainly Nozick's distinction does capture something intuitively appealing. It has often been said as a

2. Worse off, that is, in what they are able to use; it is not enough that they be worse off with respect to what remains available for initial appropriation. See p. 178.

criticism of utilitarianism that it ignores morally significant relations resulting from past actions.<sup>3</sup> Nozick's distinction is of great interest if it gives this criticism a more abstract form and shows it to apply not only to utilitarianism but also to Rawls' theory and to virtually every other theory commonly offered. But I do not think that the distinction has the importance claimed for it. To see why, let me consider the reasons Nozick offers for holding that all patterned principles are clearly wrong.

These reasons can be quickly seen in Nozick's frequent remark that, since gift giving can upset a pattern of distribution, supporters of patterned principles of justice would have to forbid this form of "loving behavior" (p. 167). More generally, let  $D_1$  be the distribution of goods obtaining in a given society and suppose that this distribution is in accord with our favorite pattern (for example, strict equality). This distribution can be changed into another distribution  $D_2$ , not in accord with this pattern, by any one of a variety of means: by gifts, by someone's starting a very successful business in his spare time using only resources to which he was already entitled under  $D_1$ , or, as Nozick suggests, by all one million of us willingly paying Wilt Chamberlain 25¢ apiece for the privilege of watching him play basketball. To maintain  $D_1$  one would have to restrict these activities. Such "continuous interference" is, Nozick says, obviously unacceptable. Therefore one must conclude that no patterned conception of justice can be correct.

One immediate response to this argument is to doubt whether anyone ever held a "patterned" conception of justice in the sense that is here refuted. A person who objects to the inequality in the world is unlikely to be concerned with those who have less as a result of their giving away or trading part of what was once an equal share. What offends an egalitarian primarily is the great inequality in the initial resources people have as a result of the social positions into which

3. Thus, for example, W. D. Ross says: "The essential defect of the 'ideal utilitarian' theory is that it ignores, or at least does not do full justice to, the highly personal character of duty. If the only duty is to produce the maximum of good, the question who is to have the good—whether it is myself, or my benefactor, or a person to whom I have made a promise to confer that good on him, or a mere fellow man to whom I stand in no such special relation—should make no difference to my having a duty to produce that good. But we are all in fact sure that it makes a vast difference." *The Right and the Good* (Oxford, 1930), p. 22.



they are born. But here Nozick can respond that this does not escape his point. Arbitrarily great inequalities in the starting places of members of one generation can result from gifts and voluntary exchanges by members of previous generations. Thus, maintaining even this looser kind of equality can require restricting these activities.

So put, this is not such a startling conclusion; certainly it does not make egalitarianism look as foolish as first appeared. This is so, first, because there is no longer the appearance of unanimous consent. It is no longer plausible to respond, "Well, if the fans are all happy to pay [everyone now living in the society is a fan] and Wilt is willing to play at that price, how can a meddling egalitarian object?" Second, this way of looking at the example changes our picture of the liberties that are likely to be infringed. The liberties involved in the example seem to be these: the liberty of the fans to pay an extra quarter to see Wilt play, his liberty to keep any amount he may receive through such transactions, his liberty to decide whether or not he wants to play for the amount remaining after taxes from what the fans and promoters offer him, and, finally, the liberty of his heirs to keep any amount of money he wishes to pass on to them. It does not seem likely that egalitarians, if their objectives are as I have described them, will want to keep watch over everyone's quarters or to conscript basketball stars. What is at issue, then, is the right of a person to keep as much as others are willing to pay him for his services and the right of heirs to receive unlimited bequests. But there is no strong intuitive ground for thinking that these rights are absolute, and little ground for surprise at the suggestion that the pursuit of equality might call for their infringement.

Nozick tries to make such measures seem more alarming to us by tying them to more extreme forms of intervention. Thus he says that "Taxation of earnings from labor is on a par with forced labor" (p. 169), and elsewhere he asks why, if we are going to set a limit on how long a person can control goods and transfer them to others, we do not have immediate confiscation (p. 163). But there seems to be no reason to disregard such obvious differences in the degree of regulation of a person's life. It may be true, as Nozick claims, that there is a continuum of interferences extending from taxation to forced labor, each foreclosing a few more options than the preceding. But the fact

that there is such a continuum is no reason why we must be indifferent between any two points along it. Even if Nozick does not convince us that restrictions on earnings or inheritance in order to maintain equality are unacceptable, however, his examples do raise the question why any interference at all should be justified in order to preserve a pattern. As he says, what is so great about a pattern?

There are many different concerns which lead people to call for greater equality, and not all of these involve a pattern in a fundamental way. For example, a person's primary political goal may be to alleviate the terrible conditions under which many are forced to live. The fact that others are at the same time much better off shows that it would be possible to eliminate this suffering and, one might add, to do so without reducing anyone else to this low a level. The resources are there; they just need to be redistributed. For a person taking this position, a humanitarian, equalization is merely a means to the improvement of the lot of those currently worst off. It is possible that a person who is intensely concerned with this cause today might be quite satisfied if the living standard of everyone in the world were significantly improved, even if the gap between rich and poor was left unchanged.

A second position would take pattern more seriously but still assign it a purely instrumental role. A person taking this position is concerned by the fact that where there are great differences between rich and poor, especially where wealth is concentrated in a few hands, the wealthy come to have an unacceptable degree of control over the rest of the population. They have an unacceptable degree of control over what jobs there are, over what is to be produced and over political processes as well. For this reason, the growth of inequality can turn acceptable institutions into unacceptable ones even when this inequality is generated through what otherwise appear to be innocent means. These considerations seem to me powerful where they apply, but they argue only for the elimination of the more extreme forms of inequality. A more rigorously egalitarian position might hold that even where neither of the preceding evils arises (no one is in want, and there is no threat of domination), inequalities are still objectionable because they are incompatible with healthy social relations and the development of genuine community. Putting the matter in terms of the pursuit

of a social ideal seems to rob the demand for equality of some of its force. It needs to be explained why this particular ideal is morally important.

This explanation might be sought in a fourth egalitarian position. A person holding this position would object to inequalities in life-prospects flowing from differences in family wealth by arguing that all differences in treatment require justification, and these differences are undeserved and arbitrary. It is worth noting that Nozick, while being generally hard on egalitarian claims, allows that the demand for a justification of inequalities in initial resources would be valid if these were the result of some centralized mechanism of distribution (p. 223). He rejects this demand on the ground that such inequalities do not result from "state action" but instead flow from the independent actions of many individuals all acting within their rights. The results of such a process, he claims, need no independent justification. I shall return to this point later.

A supporter of this fourth position needs to say something about why unequal distributions, and not equal ones, require special justification.<sup>4</sup> One reason might be that we recognize it as a distinct kind of bad thing for a person to be made worse off than others in his society are. The evil in question here is essentially comparative. It is not just that it is a bad thing to be at a low level of well-being, nor is it just that anyone would prefer to be at a certain higher level (the one where, as it happens, others are). What is bad is being at a lower level *when others around are much better off*. (It is worst when the level others have attained is the norm in your society.) If this kind of relative disadvantage is a bad thing, then institutions which inflict it on people require a defense. Such a defense can be given. The better circumstances of others may be somehow earned, or it may be impossible to eliminate such differences or too expensive in terms of other benefits to do so. What is special about equal distributions is just that they require no defense of this particular kind.

If the evil of being relatively disadvantaged justifies eliminating in-

4. This question is raised by Thomas Nagel in his review of Nozick's book. See p. 148 of his "Libertarianism Without Foundations," *The Yale Law Journal* 85 (1975). The hypothesis I go on to discuss is consistent with Nozick's remark (p. 210) that an egalitarian sees inequalities as involving a cost.



equalities by redistribution, however, it may be asked whether it does not provide an equally strong reason for simply worsening the position of the better off when redistribution is not possible. This may sound irrational, but in the case of many social inequalities, for example, distinctions of rank or social caste, egalitarian demands for the elimination of nonredistributable advantages are not implausible. In other cases, where we think that nonredistributable advantages should not be eliminated, this is not because these advantages are consistent with pure egalitarianism but because we temper the demands of equality with other considerations.<sup>5</sup> Equality is not our only concern.

Similarly, it is open to the supporters of any of these egalitarian positions to recognize that powers to dispose of one's possessions—to give them away, to exchange them for others, to determine what will happen to them after one's death—are very important. Indeed in speaking of "distribution" they have always assumed that to distribute a good to a person is to give him some powers of this kind over it. Nozick's examples show that the interests served by these powers are among those things which must be weighed against the various considerations supporting equality. This is something that a realistic egalitarian can accept.

Certainly a theory cannot talk sensibly of patterns of holdings without considering how these patterns are to be produced and maintained. If this were all he was claiming in saying that no purely end-state or patterned theory is tenable, then Nozick would certainly be right. This would not do much to clear the field, however. As Nozick rightly points out, philosophical theories of distributive justice have often neglected the problems of how patterns of distribution can be established and preserved, but a theory can incorporate such considerations, and so avoid being an end-state theory in this narrow sense of the term without coming close to the position Nozick favors.

It seems, however, that Nozick's rejection of end-state theories encompasses more than the claims I have just endorsed. For he wishes to reject Rawls' theory as an unacceptable end-state theory, despite the fact that it incorporates considerations of entitlement through the

5. For such a view of equality see Christopher Ake, "Justice as Equality," *Philosophy & Public Affairs* 5, no. 1 (Fall 1975): 69–89.

notion of pure procedural justice.<sup>6</sup> If the basic institutions of a society are just, according to Rawls, then the holdings people acquire through the operation of those institutions are legitimate, whatever these holdings may be, and people have rights over these holdings as the rules of the institution provide. The basic structure itself is just, according to Rawls, if it conforms to his Two Principles, namely the principle of maximum equal basic liberties and the principle that institutions generating unequal holdings are just only insofar as these inequalities are to the benefit of the worse off, and only if the positions of greater reward are open to all under conditions of fair equality of opportunity. Nozick objects to this theory on the ground that the entitlements it supports have only a derived status; its fundamental principles, he says, are end-state, and it is therefore to be rejected. This rejection would also apply to the modified egalitarian positions I have described.

What is the basis for this stronger claim, that any acceptable theory must make entitlements fundamental? In arguing against Rawls, Nozick maintains (pp. 199–202) that a theory which brings in entitlement principles as derived principles to be defended by appeal to more fundamental moral notions together with empirical facts will strike us as wrong for the same reason that act-utilitarian attempts to account for rights seem so obviously mistaken. What is derived in such theories will be only approximations of the principles we intuitively want, and even where they support the same conclusions as these principles do, they do so for what seem to be the wrong reasons.

Whether this objection is persuasive against an end-state theory will depend on the character of the end-states with which that theory is concerned. Consider, for example, a theory concerned solely with the production of certain valued states of consciousness, or one concerned with securing equality in what people physically possess. It might be claimed within such a theory that certain rights to dispose of one's holdings are justified because they are a good means for producing an end-state of the required kind. Such an argument would indeed strike us as mistaken for reasons of the kind Nozick mentions, reasons strictly analogous to those that plague an act-utilitarian account of

6. See John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), pp. 84–88, 304.

the obligation to keep one's promises or of the prohibition against paternalism. But a modified egalitarian theory of the kind I suggested above would not have this problem. In such a theory, control over various aspects of one's life is something which has an independent value. This provides a direct basis for arguments in support of the personal rights that secure and protect such control, removing any need to appeal to whatever tendency these rights may have to promote other, intuitively unrelated effects. It is on such a basis that Rawls' theory recognizes powers and liberties, including the right to hold personal property, as primary social goods.<sup>7</sup>

The value attached to the ability to exercise control over a certain aspect of one's life is not the same thing as a right assigning a person a particular form of such control. (For example, the value attached to being able to be unobserved is not the same thing as a right which is designed to secure a certain form of privacy.) But this value is the natural reason for having such a right, and it is, I think, the element often missing from utilitarian accounts that seek the value of a right in its tendency to promote some further unrelated effects. To recognize a particular interest as meriting protection in rights is not to say that it is to have absolute protection. It may be a difficult question how a right can be designed to protect that interest and how much protection can be given at tolerable cost. Rights of privacy, for example, represent a strategic attempt to protect our interest in being free from unwanted observation while not making life too difficult in other ways.

This general point about the relation between workable rights and the human interests that make them important has a further relevance to Nozick's argument. In defending his particular system of rights, Nozick often seems to assume that any alternative rights would be wholesale in character.<sup>8</sup> One such right which he considers is "the right to have a say over what affects you" (p. 268). Nozick properly points out that a right literally to have a say in all decisions that affect you, or even in all those that affect you deeply and intimately, would be impossibly broad. It is essential to distinguish between different ways in which something can affect a person. As Nozick puts it, what decision affects me more deeply than the decision the person I love makes

7. *Ibid.*, pp. 61, 62, 92.

8. For a general form of this objection, see Nozick, p. 238.

in deciding whom to marry? But this does not mean that I should have a right to a role in making that decision. Nozick's conclusion is that it is my "Lockean" rights that determine which things, among all those that affect me, I have the right to a say over.

I would agree that, while the importance of rights largely flows from the importance of having control over things that affect one, the function of a system of rights is to distinguish between the various ways that things can affect people and to apportion out particular forms of control. It follows that if we are agreed how this is to be done, then we will refer to people's rights in order to determine what they are entitled to a say over. But it does not follow that Nozick's "Lockean" rights are the correct ones, and this is just what is at issue.

If a supposed right turns out to give the person holding it an obviously unacceptable degree of control over other people's lives then that is ground for saying that there is no such right. The proposed "right to have a say over what affects you" fails this test. But what the objection formulated in terms of this right is really claiming is that unrestricted property rights of the sort favored by Nozick must also be rejected on the same grounds.

This issue is also raised by an objection which Nozick takes up in the section entitled "Voluntary Exchange." This objection maintains that a situation in which workers accept employment at very low wages cannot adequately be defended by saying that this is a voluntary agreement. For the alternatives faced by the workers may be so bad that they have no choice but to accept the terms offered them. Responding to this, Nozick claims that whether limitations on one's alternatives undermine the voluntariness of one's action depends on what these limitations are. First, they must be human actions, and, second, they must be actions that the agents lacked the right to perform. He cites the example of someone who marries the only available person (all the more attractive partners having already chosen others) as a case of an action that is voluntary despite removal of all but the least attractive alternatives through the legitimate actions of others.

To begin with, voluntariness does not seem to be the relevant notion here. A person's action could remain voluntary even if *illegitimate* intervention removed the more attractive alternatives. Perhaps we would say in such a case that he was forced to choose the lesser of



the remaining evils, but the moral significance of this remark is not clear. Sometimes it is all right to force someone to do something by making the alternatives unacceptable, and being so forced does not always invalidate agreements made. It may depend on who does the forcing. Thus, even if the notions of forcing and voluntariness sometimes incorporate notions of rights, as Nozick's analysis of voluntariness suggests, they certainly do not always do so. Where they do not, it seems unlikely that we can settle the question of the moral acceptability of a form of treatment by appeal to intuitions about forcing and voluntariness. If these notions do incorporate moral principles, then such appeals to intuition are going to be suspect when these principles are themselves in dispute, as they are in the present case. Disagreements about these principles will be translated into conflicting judgments about the voluntariness of actions and into disagreements in particular cases over whether "voluntary" is being used in a morally charged way.

The real question at issue in the case at hand is whether it is justifiable to allow wages to be determined by bargaining under the conditions here envisaged. It is the connection with justification that makes plausible Nozick's restriction of attention to limitations on alternatives that are brought about by human action. Even though acts of nature may limit our alternatives, they are not subject to demands for justification. But individual human actions are not the only things subject to such demands; we are also concerned with social institutions that make it possible for agents to do what they do. The objection that Nozick considers challenges the assignment of rights which determines the bargaining positions of employers and workers. It raises the question whether this system of rights does not protect the liberties of some people in a way which gives them an unacceptable degree of power over others. This question cannot be met merely by reaffirming the rights in question. A further level of argument is invoked in the analogy with marriage. The suggestion is that any interference with the rights of employers would be an intolerable intrusion—as a forcible reassignment of marriage partners would. Serious consideration of such a claim would bring Nozick's argument onto the same plane as the objection he is confronting. To settle the question between them, one would need an assessment of the relative im-

portance of the various forms of liberty that are at stake and an account of how these and other values would be affected by alternative assignments of rights.

It is worth pointing out that the standards of importance employed in such an argument will be socially relative. Whether assigning one person the right unilaterally to deny others access to a certain good (say, university education) gives him a morally significant or questionable degree of control over them depends on the role that this good plays in the lives that people lead and aspire to in that society. This question is not settled by asking whether people could have done without the good in the state of nature or by asking how much it is valued by the particular individuals who are involved in a given case. Something between these two is required; something less subjective than the latter but more historically variable than the former. Nozick describes such a standard as the relevant one for deciding whether a person must be compensated if others prohibit him from a course of action which creates risk that their rights will be violated. Compensation is due, he says, if the actions are of a type that "are generally done, play an important role in people's lives and are not forbidden to a person without seriously disadvantaging him" (p. 81). It would seem that this standard should also be appealed to in defending claims about how far people's rights extend, but Nozick seems not to allow such appeals.

In Nozick's conception, the primary threat to liberty is the imposition of obligations to which one has not consented. Liberty is to be safeguarded by keeping such obligations to a minimum, leaving the greatest possible scope for voluntary agreements and exchange. This concern is evident in Nozick's rejection of the Hart-Rawls Principle of Fairness. As stated by Rawls, this principle holds as follows:

A person is required to do his part as defined by the rules of an institution when two conditions are met: first the institution is just (or fair), that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests.<sup>9</sup>

9. *A Theory of Justice*, pp. 111–112.

Against this principle Nozick urges the following example. Suppose that some of the 364 other people in your neighborhood decide that it would be nice to have regular programming over the public address system already installed on your block. They initiate the practice and post a notice assigning each person a day in the year on which he is to man the microphone, to play music, discuss philosophy, tell jokes, or whatever else he wishes to do. The practice goes on for some time and although you never discuss the system with your neighbors, you enjoy it greatly. But then your day comes and you would rather go fishing. Are you obligated to perform instead? Nozick says clearly not, and in this he may be right. He also claims that the Hart-Rawls principle would require you to perform and is therefore mistaken. He goes on to hold that there is no way to patch up the principle so that it would avoid this consequence while still generating a nonconsensual obligation to obey the commands of the state.

It should be said that insofar as this criticism is addressed to Rawls, it is slightly off the mark. In *A Theory of Justice*, Rawls rejects the idea of deriving the obligation to obey the law from citizen's receipt of the benefits of government. The Principle of Fairness is to apply only to cases where the receipt of benefits is voluntary, and in the case of the state it is usually not. Where there is a moral requirement to comply with nonvoluntary institutions such as the state, this requirement derives (via what Rawls calls the Natural Duty of Justice) merely from the fact that those institutions are just.

Whichever way we look at it, however, the justice of an institution is a crucial factor in assessing our obligations to it. Is the neighborhood broadcasting network described by Nozick a just institution in the relevant sense? Nozick's positive answer seems to be based on a narrow construal of the appropriate standards of justice. He takes it to be just because the benefits are evenly distributed and the burdens (days on duty) shared equally. But there are other considerations than these. For example, there are considerations of liberty: the power to determine the schedule (about which nothing is said) and the power to determine who is to participate ("the organizers" just draw up a list). My intuitive judgment as to whether there is an obligation to perform is quite sensitive on both these issues. If we take the organizers' action as an official fiat then the obligation seems nonexistent.

But if we take their list merely as a suggestion to which the person in question might have objected but did not, then the obligation is less preposterous. Similarly, in general, in assessing the justice of an institution, we must consider the restrictions it imposes on people's liberty. We ask whether these restrictions are rationally related to the justifying purposes of the institution (how much would be lost if participation were made fully voluntary?) and whether these purposes (and this incremental contribution toward them) are sufficiently important to justify these restrictions. Arguably the neighborhood network fails on both counts. Arguably some activities of the state beyond those countenanced by Nozick pass.

The contrast between Nozick's and Rawls' views on political obligation illustrates the important difference between two types of consent theory. In theories of the first type, actual consent has a fundamental role as the source of legitimacy of social institutions. Theories of the second type start from the assumption that the institutions with which political philosophy is concerned are fundamentally non-voluntary. These institutions are held to be legitimate if they satisfy appropriate conditions, and the idea of hypothetical consent enters as a metaphorical device used in the formulation and defense of these conditions. Questions of actual consent arise only as internal questions of liberty, that is, as questions about what options acceptable institutions must leave open to those living under them. The difference between these two theories is magnified by the fact that the idea of consent involves choice against some background of alternatives. If what is at issue is initial consent to institutions from without, then the relevant background is that of this pre-institutional condition. It is only this viewpoint that makes the "baseline" of conditions in the state of nature seem relevant. By contrast, since the questions raised through the device of the hypothetical contract are questions about the justifiability of social institutions to people who find themselves living under them, the relevant background is given by the alternatives actually available to people in societies and the values that such people attach to these alternatives. This is not to say that the values assigned to various choices and prospects by people in a given society are always morally determinative. They may be set aside if they can be shown to be artifactual in a way that makes them morally suspect.



But there is no temptation, on this view, to take the standards of some earlier (for example, pretechnological) age as relevant to the acceptability of contemporary institutions.

The idea that respect for individual liberty requires that consent be a necessary condition for all obligations beyond the requirements of a minimal framework of rights arises in the same way as the idea that makes subjective preference seem the only acceptable basis for ethically significant judgments of relative well being. Further, the two views involve similar mistakes. Welfare economists and those who support subjective versions of utilitarianism are moved by the belief that the interests of the affected parties are the bases on which social policies should be appraised and by the belief that it is unacceptable to “impose” on these parties, as the relevant account of their interests, a system of values that they do not share. The response to these beliefs is generally to bring individual preferences into a theory at the foundational level, making them the basis for all judgments of relative value. A few restrictions on what can count as admissible preferences may be allowed in the form of requirements of consistency, transitivity, and so on, but anything beyond such purely formal restrictions is seen as a threat. When a theory is constructed in this way, so that it treats almost all preferences at face value regardless of their origins or content, its conclusions can be substantially affected by the social conditions which influence prevailing preferences and their relative strengths. This robs the theory of an important kind of critical power and, in addition, makes it an uncertain guardian of even those values of individual autonomy which it set out to protect. Many different conditions are important for the development of autonomous preferences, and the ability of individuals to give effect to their preferences in their own lives and in the determination of social policy depends on a variety of powers and liberties. To give appropriate recognition to the value of individual autonomy a theory must assign appropriate weights to all these factors in balancing them against each other and against other competing considerations. Autonomy is not adequately recognized simply by letting these weights and all others be determined by whatever constellation of individual preferences happens to prevail at the point at which the theory is applied.

Similar problems arise for a view which, acting out of a desire to safeguard individual liberty, brings consent in at the foundational level as the basis of almost all obligations, and allows it to be restricted by only a minimum of “imposed” moral requirements. The consequences such a theory can endorse are unacceptably open to determination by factors affecting the relative bargaining strength of various individuals, for example, variations in the demand for and scarcity of particular talents and resources. In particular, the ability of individuals to exercise the kind of control over their lives that freedom from imposed obligations is supposed to secure will be to an unacceptable degree merely a function of their bargaining strength. As in the previous case, the conclusion to be drawn here is that individual liberty is not adequately protected simply by bringing consent in as the foundation of obligation. An adequate theory must take into account the various ways—other than merely by being morally free to withhold one’s services—in which individuals may be enabled to exercise control over their own lives and their common institutions (or disabled from doing so.)

Preference-based theories of social welfare and consent-based theories of obligation can be seen as, respectively, teleological and deontological responses to similar intuitive ideas. The two are brought together when utility is taken as the basis of arguments for the efficiency of the free market. Each also derives support from a form of skepticism about the existence of an ethically significant, objective basis for the comparison and balancing of the interests of different individuals.<sup>10</sup>

The two forms of consent theory correspond to two differing views of rights. Either view may recognize rights as a basis for individual claims against social institutions. Thus both see some rights as “natural” in the sense of having validity that does not derive from positive law or social institutions. On the first view, however, the rights that are the basis for moral criticism and defense of social institutions are

10. In Nozick’s case the skepticism concerns the ethical significance of such balancing, not its epistemological basis. For a thoroughgoing rejection of balancing see pp. 32–33. This extreme position is criticised by Nagel in his review cited in fn. 4 above. A more moderate position, according to which rights set the limits of permissible balancing, is suggested by Nozick on p. 166.

seen as “natural rights” in the stronger sense that they are the very same rights which individuals possess and can claim against one another in a state of nature. On the second view, rights represent general judgments about the conditions of legitimacy of social institutions, for example, judgments of the form “Any institutions granting *that* power are morally unacceptable.” Exactly which such generalizations seem true and important—what things are rights and what these rights encompass—are matters that will change as social conditions change. Some of these rights concern things that would be of no relevance, or only a very different and more limited kind of relevance, in a state of nature. (Rights to freedom of expression, due process of law and political participation seem to have this character.)

It is central to Nozick’s argument that the rights with which he is concerned are claimed to be natural rights in the stronger sense. The objections I have raised to his examples almost all demand that he consider the consequences of enforcement of absolute property and contract rights and that he explain why the loss of liberty this involves for some people is not worse than that which is involved in the alternative systems which he deprecates. Such objections suppose that the property rights enforced by the minimal state and those embodied in socialist institutions are two alternative social systems open to the same kind of objections and needing the same kind of defense. Nozick rejects this symmetrical picture. In his view, the particular property rights protected by the minimal state are not licensed or created by it and consequently do not need to be defended as part of its justification. These rights are ones that individuals have quite independently of the social institutions in which they live. In enforcing these rights the minimal state is only doing for them what they were already entitled to do for themselves. Consequently it is not doing anything that could be held to infringe anyone’s liberty.

How plausible is the claim that the rights appealed to in Nozick’s examples are ones that individuals would have in a state of nature? This claim has greatest initial plausibility with respect to the right of nonaggression. An unprovoked attack occurring today on the streets of New York seems to be wrong for the same reasons that would apply to a similar attack in the state of nature. But the right of nonaggression as Nozick interprets it covers more than this. It prohibits generally

“sacrificing one person to benefit another” (p. 34). I take it that what Nozick wants to rule out here is any use of force or the threat of force to make one person contribute to the welfare of another who has no right to this contribution. This last qualification reduces the right considerably, but without it the right would be absurd. This shows that the right of nonaggression cannot be interpreted in isolation from other rights. Its invariance between the state of nature and other conditions will consequently depend on that of these other rights.

Chief among these is the right to one’s property. A system of property is a set of rules defining the conditions under which a person owns an object and specifying the extent and character of the rights of owners. What a person’s property rights are will normally depend not only on what systems of property could be validly enforced under the conditions in which he lives but also on what system is actually in use. To the extent that this system is morally legitimate, its provisions determine his rights. But the provisions of this system may also be wrong. They may claim for him rights that no one could really have or they may fail to protect claims that any valid system would have to recognize. Surely we can imagine an incident, occurring in a state of nature, which strikes us intuitively as a violation of property rights. Imagine that a family is living in the wilderness when a group of strangers comes along and drives them off part of their land and takes their crops. This strikes us as a clear wrong. I take it that the point of saying that this happens “in a state of nature” is just that the wrongness involved does not seem to depend on any system of law or social convention. But it is open to question whether what we feel to be violated in such examples is really a natural right to property.<sup>11</sup> For these cases strike us as clear wrongs only if we suppose, first, that what is taken is of use to the person who loses it (that is, that the taking actually constitutes an interference with his life and activities) and, second, that his appropriation and use of the thing did not already constitute an interference with others. (The notion of what constitutes an “interference” will depend on, but perhaps not be exhausted by, a historically varying notion of “normal appetites.”) When these condi-

11. The following argument is drawn from my article, “Liberty, Contract and Contribution,” to appear in G. Dworkin, G. Bermant and P. Brown, eds., *Markets and Morals*.



tions are satisfied, the taking infringes upon what might be called the natural right of noninterference. A system of property rights goes beyond this primitive right by specifying formal criteria of ownership. If a person is deprived of something to which he has acquired title in the specified way, then his property right has been violated whether the taking makes any difference to his life at all. Different systems of property carry out this extension in different ways, each specifying its own criteria of ownership and defining and limiting the rights of owners in its own way. These extended rights require justification since, as one's person's claims to forbearance cease to be limited by the requirements of a normal life, the justification for these claims become more attenuated and the threat they present to others grows more serious.

To support the claim that some property rights are natural rights we need to think of a state of nature example involving a clear wrong which seems to violate one of these rights without violating the primitive right of noninterference. But if we imagine such a case we may be open to the question of why we should imagine a state of nature containing *that* particular system of property, rather than some other system which would not be violated by the act in question.

This objection could be avoided if we could show that the primitive right of noninterference does not exhaust the common core of systems of property rights. Perhaps there are certain provisions falling outside this right which would be incorporated in any system of property rights that could plausibly be held to be valid in a state of nature. It could then be argued that the provisions which Nozick's examples turn on fall in this class, for example, that an unrestricted right of inheritance does so. But this is far from clear. Suppose the grandfather of the family we previously imagined lived on land a short distance away and that when he died he said, "Now this is yours." But they had all they could do to take care of their own place, and one day they noticed that someone else had moved onto their grandfather's old farm. Are they entitled (in the state of nature) to throw the people off or to demand payment? It is not obvious to me that they are. Even if there is "as much land and as good" not far off, their claim to demand that the new people move to it is quite debatable. Furthermore, even if we were to be convinced by such examples that any system of

property valid in a state of nature would have to include unrestricted inheritance, there would remain the question of how much this judgment is dependent upon our assessment of the consequences that this provision would have in a "natural state." These consequences are apt to be quite different from those that would result from the same provision under other social conditions.

It is of interest here that Locke clearly distinguishes between the natural property rights that he sees as holding in a state of nature antecedent to law or social convention and the systems of property that arise later with the introduction of money and the creation of government.<sup>12</sup> The system of natural property rights under which men can acquire title to things by laboring on them is held by Locke to be valid without consent. It is crucial to his argument for the validity of these rights that, under the conditions of the state of nature, the holdings to which people can be expected to acquire title will not extend beyond "the conveniences of life."<sup>13</sup> They will not do so because the right itself is restricted by the proviso that things not be held if they will just go to waste and because the things men are interested in acquiring in a primitive state are generally "of short duration."<sup>14</sup> This limit on the extent of holdings is important to the positive case for the natural right of property since it means that the things the right protects are needed for a normal life. It also forestalls objections to the right by providing an important part of the reason for believing that acquisition under it will not allow one person to "entrench upon" others but will leave them with "enough and as good."<sup>15</sup> Thus, under the conditions Locke believes to hold in the state of nature, his natural right of property will not significantly extend what I have called the right of noninterference, and Locke's argument for the validity of his right depends upon this fact.

Once the introduction of money gives men the means to store up, without spoilage, more than they can use, and commerce gives them a reason for doing so, there is no longer any reason to expect holdings to be limited to the conveniences of life. When this happens, the original moral foundation for property rights is no longer valid, and a new foundation is required. Locke takes consent to be this founda-

12. *Second Treatise of Government*, §50.

13. *Ibid.*, §36.

14. *Ibid.*, §46.

15. *Ibid.*, §36.

tion. The “disproportionate and unequal possession of the earth” which may obtain after money comes into use is legitimated, according to Locke, by the “tacit and voluntary consent” which men give to the use of money and without which it would not work.<sup>16</sup> Later systems of property founded by positive legislation derive their authority from the consent men have given to their governments.

Nozick appears to reject both of these latter foundations for property rights. He avoids invoking a social contract, and he denies Locke’s empirical claim that a functioning system of money requires consent, suggesting that it could arise instead through an “invisible hand process” (p. 18).<sup>17</sup> He faces the problem, then, of deriving an extended system of property rights involving money, commerce, and extensive holdings from something like Locke’s original “natural” foundation. This derivation faces two problems. The first is that the lack of natural bounds on acquisition means that others are likely to be threatened—there may not be enough and as good left for them. As I have already mentioned, Nozick’s response here is that the increase in the stock of goods due to increasing productivity will keep pace with increased acquisition, making it unlikely that anyone will be made worse off relative to the baseline of expectations in the state of nature. The second problem is that, with holdings extending far beyond “the conveniences of life” (certainly far beyond what these included in the state of nature), the case for absolute protection of these holdings becomes weaker. This makes even more controversial the choice of an extremely low baseline for determining whether the condition of others is worsened.

In closing, let me mention two important problems to which Nozick’s book calls attention. It is a virtue of the book that it forces us to consider economic institutions not merely as mechanisms for the distribution of goods but also, like political institutions, as placing restrictions and demands on us which raise questions of obligation. When

16. *Ibid.*, §50.

17. Nozick does not discuss the normative purpose of Locke’s claim, and it is not clear that Locke’s argument is affected by his objection. Locke uses the word “agreement,” but he does not clearly assert, and does not need to claim, that an explicit agreement is needed to establish a system of money. All he needs to claim is that the continued functioning of such a system involves everyone’s tacit consent.

things are seen in this way it becomes apparent that questions of economic liberty must be considered, along with political and civil liberty and fair distribution, as conditions for the legitimacy of social institutions. I hope that this will have an impact on contemporary moral and political philosophy, where economic rights and liberties have generally been neglected in favor of political and civil liberties and rights of other sorts. I have argued that the particular framework of property and contract rights which Nozick proposes does not constitute an adequate account of the claims of economic liberty. In opposition to this framework I have appealed vaguely to the value of having control over various aspects of one's life, and I have asserted that a workable system of rights could be developed that would secure this value, and others, more adequately than the rights Nozick advocates. What is needed, however, is a systematic account of the relevant forms of liberty and control and of the values associated with them.

The idea that rights constitute constraints on the pursuit of the maximum social good (p. 166) has great appeal as a way of avoiding the objectionable consequences of utilitarianism. I have not been willing to accept the particular system of rights which Nozick opposes to utilitarianism, however, and I have complained that these rights require defense. But this demand for justification, a demand that any alternative conception of rights must also satisfy, seems to lead inevitably back to an appeal to consequences, and to the balancing of individual benefits and burdens. I have certainly made heavy use of such balancing in my objections to Nozick's views. The problem remains, then, of giving a satisfactory account of what this balancing involves and how it is relevant. This account must avoid falling back into an objectionable utilitarianism without simply invoking another set of a priori rights.