

AGAINST NONLIBERTARIAN NATURAL RIGHTS

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In a recent article^[1] critical of Robert Nozick's book *Anarchy, State, and Utopia*,^[2] Samuel Scheffler argues that it is possible to give greater than libertarian scope to natural rights so that, contrary to Nozick's conclusions, non-voluntary redistribution of income would be morally justified. Scheffler proceeds by sketching a conception of natural rights somewhat different from Nozick's which he believes accords with the meager and barely explicit moral theory that supports Nozick's own politics. This conception of natural rights borrows considerably from the *prima facie* rights theory developed by, among others, Gregory Vlastos.^[3] Scheffler maintains that nothing in Nozick's own meager moral underpinnings justifies the "libertarian constraints" against non-voluntary redistribution of income (or other goods or services). This is because, in ascribing the *prima facie* right to liberty to each person, it is still morally justified to disregard this right in favor of the *prima facie* right to welfare, for example.^[4]

Elsewhere I argue^[5] that it is not possible to substitute the *prima facie* rights theory for the natural rights theory without upsetting the function that both *prima facie* and natural rights theorists ascribe to basic rights in a legal system — in Vlastos' phrase, in a "scheme of justice".^[6] In this note I will argue that Scheffler's case against libertarian constraints (*à la* Nozick and Locke) is unsuccessful, that Scheffler's own meager and barely explicit moral underpinnings do not support his broad conception of natural (e.g. welfare) rights, and that, contrary to Scheffler's assertion, a society governed by a system of justice based on the Lockean natural rights Nozick and I would advocate would not produce the adverse social consequences Scheffler describes.

Although Scheffler adopts John Rawls's idea of natural rights,^[7] he does "not here specify which natural attributes are sufficient conditions for the possession of natural rights".^[8] All we are told is that "every person has a natural right to a sufficient share of every distributable good whose enjoyment is a necessary condition for the person's having a reasonable chance of living a decent and fulfilling life" (with several spelled out qualifications which are not germane to my argument).^[9] Following Nozick, Scheffler does not provide a complete account of the moral basis of his conception of natural rights but offers only the barest clues to what that basis would probably be:

The fact that the welfare goods are obtainable in practice only through the mediation of a complex society of working men and women is certainly of significance for the alternative conception. But its significance is not to show that people do not, after all, have the rights which the alternative conception assigns to them. Rather, its significance is to show that individuals with rights also have duties: duties, in particular, to contribute their labor, according to their talents and abilities, to the enhanced functioning of the society in which they live.^[10]

So where in Nozick, as Scheffler notes, only some vague idea of "the meaning of life" avoids rendering the case of Lockean rights a mere "prudential argument",^[11] here it is a vague notion of "duties to society" that provides the alternative conception of natural rights with its broader than Lockean or libertarian scope. It seems to Nozick to be a morally worthy task for one to be "giving meaning to his life"; so, it appears, the Lockean rights which make this "striving for meaningful life" possible may well obtain their moral support from this idea. Alternatively, because it seems to Scheffler that it is morally proper that the "duties to society" be per-

formed, the broader conception of rights Scheffler defends may well obtain their moral support from this idea in view of the fact that only such a broader conception can insure the maximum performance of those duties. It appears from what Scheffler says *and* does not say that for him the basic moral standard in support of a sound political theory consists of a set of duties persons have to society (i.e. "to the enhanced functioning of the society in which they live").

A preliminary point should be made about the possibility of the libertarian alternative making room for the duties Scheffler speaks of. The market may be precisely the place where people should contribute their labor, etc., to their society's enhanced functioning. If, as I shall argue, one's having a duty to be productive does not imply that anyone is morally justified in requiring another's productivity by non-voluntary means, then in a libertarian society the work people perform in the free market (for pay or other purposes) may well constitute their contribution to the enhanced functioning of the society in which they live. The objection that this would not accord with regarding the work as one's duty is to beg the question as to whether one's duties must benefit others alone. Productive work done for pay does benefit others — why else the pay? (At least it could be viewed along these lines.)

Now to Scheffler's account of natural rights based on the moral theory of duty to benefit society (others, their enhanced functioning). In this account there is insufficient attention paid to both the relationship between rights and duties and to the place rights take in moral theory. These points are, of course, related. A duty is some possible course of action human beings should take because morality requires it. In certain moral positions duties constitute the basic principles, in others duties are derivative, based on virtues, self-interest, etc. In Scheffler nothing outside rights and duties is mentioned. We know rights as moral principles pertaining to the relationship of people — what they may not do to each other or owe to each other in a social context — and *natural* rights are principles pertaining to the relationship of people derived from their nature: what they

owe to each other or may not do to each other because they are human beings in the community of other human beings. Thus rights cannot be basic to morality. Duties can and clearly are basic in certain moral positions because one can have duties that have nothing to do with others — e.g. to be honest, courageous, productive, prudent, etc. Most duties pertain to others but duties are not necessarily duties *to* others, that is, interpersonal moral principles. The duty one may have to atone for one's sins, for example, need not be other-directed; the duty to fulfill a promise could constitute an act of perfection of one's soul; the duty to society, if it exists, could emerge from a (possibly hypothetical) contractual commitment entered into in order to enhance the circumstances of one's own social existence. In short, a duty may not be, and thus could not be treated on the model of, a legally binding principle of morality.

Since we find nothing else in support of Scheffler's alternative and nonlibertarian conception of natural rights outside the vague idea of some alleged duty to society each person has, and since duties are often not enforceable obligations but, on the contrary, moral responsibilities, Scheffler has failed to develop a conception of natural rights that would morally sanction the non-voluntary institutions he advocates. Scheffler believes that because *A* has the duty to do *d*, *B* (e.g. the government) is morally justified in forcing *A* to perform the action that constitutes fulfilling *d*. If *d* were a duty to the performance of which *B* or someone in whose behalf *B* may act is entitled (on the model of many contractual obligations), then Scheffler would have a case, but he never demonstrates that anyone is entitled or has a natural right to *A*'s performing *d*. Instead Scheffler wants to derive others' entitlement or natural right to the performance of *d* from *d* itself. Since, however, duties do not necessarily confer rights upon others, Scheffler's argument does not work.

Moreover, in advocating the enforcement of duties to society, Scheffler endorses the demoralization of these duties even if they exist. That is to say, if ought implies can, and a *moral* duty can exist only if the moral agent is free to

choose to do or not to do it, advocacy of non-voluntary performance of the duties in question implies that one is rejecting their *moral* significance. It is precisely in the framework of a Lockean legal system that morality, whether virtue or duty oriented, can flourish. This shows again that from the moral basis Scheffler introduces he cannot support nonlibertarian rights.

Scheffler has not, therefore, produced a conception of natural rights that gives moral support to non-voluntary institutions in society, that is, that justifies the violation of the libertarian constraints on how human beings should act in their relationships to each other. He did provide some vague support for moral duties over and above abstaining from the violation of people's Lockean natural rights. But showing that persons in a community should, as a *moral* requirement, act in certain ways, some of which may benefit each other, does not show that anyone, including a government, is authorized to compel the behavior that would, if freely performed, constitute doing *d*, to act so as to compel *A*. matter entirely why some moral philosophers believe that the fact that *A* should do *d* authorizes *B*, who knows this and could compel the behavior that would if freely chosen constitute doing *d*, act so as to compel *A*. Perhaps the intrinsicist theory of value, whereby doing something is morally required because it would contribute to the achievement of some independently and intrinsically good state of affairs, underlies such an idea. Scheffler certainly has not given any proof of such a theory, so he has no reason to expect us to read it into his case.)

I now turn to Scheffler's allegation that a society that adopts the libertarian theory of rights will foster serious and avoidable moral inadequacies. He believes, for example, that such a society would produce great inequalities of wealth and that "we have considerable evidence that in most societies there is a high correlation between wealth and political power".¹²¹ Thus in a libertarian society the wealthy would have unjustified political advantages which would involve the generation of unfair legal administration, subjugation, and

similar adverse results for the less than wealthy.

First, in libertarian theory political power can involve nothing more than access to judicial and police services and impact on the selection of administrators of such services. Since politics would involve only the preservation and protection of natural rights, the wealthy would at most have greater access to such service. The voluntarily acquired greater wealth of the wealthy would necessarily require, for example, greater effort to protect against possible violators of property rights. Contracts involving great sums and extensive provisions would probably require extensive adjudication procedures. This kind of political power, always paid for by those who would receive it, need not involve any degree of injustice or unfairness whatsoever, and Scheffler does not indicate why we should expect such unfairness or injustice. The slogan that bigness need not be badness applies here, and the libertarian theory would do justice to the ordinary notion of the propriety of taxation with representation (with the change that the paying of fees for government services could not be construed as taxation).

Second, the inequalities of libertarian societies need not have anything to do with wealth. History does not support Scheffler here, despite some myths about the antidemocratic character of incomplete capitalist systems of the past and present. In societies such as the ones that would involve Scheffler's conception of natural rights there may be less economic equality, but political inequalities are far greater than in semi-libertarian or liberal democratic systems. Scheffler wishes to dispel the idea that economic controls on the lives of citizens usher in the loss of significant liberties, but here history — to which Scheffler often appeals in a sort of *ad hoc* fashion — does not bear out his wish. It seems quite sensible to suppose, anyway, that where governments control land, industry, transportation, etc., serious political opposition could not be mounted. It is no accident that in socialist Russia a dissident author is unable to find a publisher. It is no mere accident, either, that in welfare states where governments own and operate

broadcasting outright — e.g. West Germany, France, Sweden — only certain groups' interests are well served. Even in the U.S. public education is centrally run, grey, politically narrow, and uniform, and this activity is almost completely socialized. In all the inequality of *political* power is obvious.

Third, Scheffler's wish to disassociate the welfare state from the usurpation of civil liberties is naive, at best, and borders on the incredible. It was Chief Justice Burger who supported the majority decision authorizing censorship of the arts by noting that: "Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography."¹³¹ The enforcement and precedent-based justification of vice statutes are certainly simpler when government has jurisdictional authority to regulate properties where alleged vices may be performed. It may be just as morally objectionable to fail to do one's duty to society as artist, journalist, citizen, or movie maker as it is to fail to do one's duty to society as manufacturer, banker, industrialist, or any other type of producer of distributable goods. So wherever the government is entitled to enforce the duties of one group, it cannot by any logic be refused the entitlement to enforce the duties of the other. (Scheffler's effort to distinguish between the vices of refusing to do one's productive duties and refusing to do one's other duties by allusions to levels of significance simply stays unsuccessful in his article.)

In essence, then, contrary to Scheffler's wishes, the bulk of government regulatory and distributional statutes makes it impossible (by reference to any rational standard) to leave one's private or voluntary community activities outside the reach of governmental intrusion and, therefore, control. Finally, when governments are constitutionally authorized to act as distributors of goods and services, there cannot (legally) exist any effective means for withholding support from their activities such as Vietnam-type foreign interventionism. Nozick was not overstating the point in noting that: "Taxation of earnings from labor is on par with forced labor."¹⁴¹ It is clear, then, that Scheffler's *ad hominem* attacks on the libertarian theory of natural rights fail just as

drastically as his attempt to develop an alternative conception of natural rights that might give support to non-voluntary distribution of income. Having now demonstrated this much, there remain a few additional bones to be picked with Scheffler's work.

Although Scheffler is right that Nozick's libertarianism, including his conception of natural rights, has but meager moral foundations in Nozick's own book, two points need to be made in this connection that will put this issue in a different light. First, Scheffler's observation that those "who choose to work within the natural rights tradition need to explicate their use of natural rights terminology . . . [and] given the metaphysical associations of the tradition [they] must explain what they *mean* by assigning rights to people . . . and they must deal with a variety of epistemic questions"¹⁵¹ seems to be intended to point up Nozick's scholarly shortcomings. Be this as it may, Scheffler does little better. Nor does he acknowledge the great deal of work that has been done within the libertarian natural rights tradition, work that would very likely supplement Nozick's.¹⁶¹ Second, Scheffler ignores the fact that Nozick accepts *Lockean* natural rights, and though Nozick considers Locke's moral foundations inadequate, Locke does give a clear enough clue — as clear as any contemporary moral and political theorist since Marx — to his own moral position.

Locke's ethics are skimpy, but we are told by him that human beings are "born free [and] rational" and "the freedom . . . of man, and liberty of acting according to his own will, is grounded on his having reason."¹⁷¹ Since he also holds that "the state of Nature has a law of Nature to govern it",¹⁸¹ he is committed to some moral position. Now and then he hints at this position. Sometimes he appears to be a straightforward Christian, but in some of his works he makes claims that are clearly hedonistic. But he seems opposed to psychological egoism, with which he is sometimes charged. He appears to be a type of egoist.¹⁹¹ If we consider that recent natural rights theorists such as Rand, Mack and myself, as well as libertarians such as Hospers,²⁰¹ defend a type of ethical egoism ascribed even to Aristotle by W. F. R. Hardie,²¹¹ then it is possible to regard what I call classical egoism — to distinguish it from Hobbesian atomistic and Max Stirner's subjectivist egoism — as the moral or ethical

foundation of Lockean natural rights.

Since the conception of natural rights that will be most successful is the one that can be defended by reference to a correct moral point of view, the strictest test of Scheffler's own conception of natural rights would have to go to the heart of Scheffler's moral position. The same is true in Nozick's case. Since there do exist elaborate attempts to provide a Locke/Nozick conception with both metaethical and ethical support — outside of several efforts to clear up the metaphysical difficulties¹²¹ — before the alternative conception Scheffler advances can be accepted, it would be necessary, in addition to overcoming objections such as those here presented, to evaluate the soundness of the moral and other philosophical theories which underlie the various positions.

It may be disturbing to some that in philosophy so much work needs to be done before we can provide solid grounding for what we may believe to be right and wrong, especially in light of the many serious problems we face around us whose solution would appear to require finishing the theoretical work. This appears to be one reason why Rawls wishes to make moral theory independent of the rest of philosophy.¹²³ Unfortunately, this wish just cannot be satisfied, perhaps precisely because of the enormous complexities of human existence.¹²⁴ It seems to me, at any rate, important to rekindle an interest in comprehensive political philosophizing, and to this end both Nozick's and Scheffler's ideas have contributed considerably. But by no means can Scheffler's relative success in finding fault with Nozick's position and with presenting a plausible but not fully supported alternative suffice to put to rest the libertarian theory. This theory has not received much attention lately, indeed it has usually been met with ridicule by intellectuals and philosophers (who could take poor Herbert Spencer as their scapegoat representative of capitalist theory up until Nozick's work appeared). Nozick's is not, however, the final word in libertarian political theory.

NOTES

1. Samuel Scheffler, "Natural Rights, Equality, and the Minimal State," *Canadian Journal of Philosophy* (March, 1976), pp. 59–76.
2. New York: Basic Books, 1974.
3. Gregory Vlastos, "Justice and Equality," in R. B. Brandt (ed.), *Social Justice* (Englewood Cliffs, N.J.: Prentice-Hall, 1962).
4. Both Vlastos and Scheffler accept the implications of

prima facie rights theory to the effect that no right is absolute within the context of the system.

5. "Prima Facie versus Natural (human) Rights", *Journal of Value Inquiry* (Summer, 1976), pp. 119–131.
6. Vlastos, *op. cit.* The citation is from Vlastos's paper as it appears in A. I. Melden (ed.), *Human Rights* (Belmont, Cal.: Wadsworth, 1970), p. 84, in revised form.
7. Scheffler, *op. cit.*, p. 64.
8. *Ibid.*, p. 63.
9. *Ibid.*, p. 64.
10. *Ibid.*, p. 72.
11. Nozick, *op. cit.*, p. 50. Throughout his paper Scheffler refers to the welfare rights of those who are destitute so that, as he puts it, "starvation, not taxation, is our worthy foe" (p. 70). I discuss this allusion to the allegedly adverse consequences of implementing the libertarian system later in this note. For now, suffice it to observe that taxation hardly serves starving people — it has been argued by many economists that taxation raises the welfare of the *taxers* and those who are politically powerful enough to reap benefit from their spoils — e.g. Lockheed Corporation, NASA, grant recipients of the National Endowment of the Arts and Humanities, etc. This reference to the crippled and starving in the present context can only be construed as the emotive pleading of the case against the libertarian alternative, especially in light of the records of socialist and other statist political systems.
12. Scheffler, *op. cit.*, pp. 74–75.
13. Paris Adult Theater I v. Slanton, 93 S. Ct. 2628 (1973).
14. Nozick, *op. cit.*, p. 169.
15. Scheffler, *op. cit.*, p. 62.
16. E.g. Eric Mack, "Egoism and Rights", *The Personalist* (Winter, 1973), pp. 5–33; Tibor R. Machan, "A Rationale for Human Rights", *The Personalist* (Spring, 1971), pp. 216–235; *idem.*, "Human Rights: Some Points of Clarification", *Journal of Critical Analysis* (July/October, 1973), pp. 30–39; and *Human Rights & Human Liberties* (Chicago: Nelson-Hall, 1975.)
17. John Locke, *The Second Treatise on Civil Government*, pp. 61, 63.
18. *Ibid.*, p. 6.
19. *Essay Concerning Human Understanding*, Book II, xx 2, where Locke says that "things are good or evil only in reference to pleasure and pain". Locke rejects a close theoretical kin of this bold hedonism in his *Essays on the Law of Nature* (London: Oxford University Press, 1955), namely psychological egoism, the view that we necessarily do what is in our self-interest or seek self-gratification. For a defense of Locke's ambivalence in ethical theory see the several essays in John Yolton, ed., *John Locke — Problems and Perspectives* (Cambridge: Cambridge University Press, 1968). For additional discussions of Locke see Leo Strauss, *Natural Right and History* (2nd ed., Chicago: University of Chicago Press, 1970), pp. 202–250; Richard Cox, *Locke on War and Peace* (London: Oxford University Press, 1960), and Michael Zuckert, "The Recent Literature on Locke's Political Philosophy", *The Political Science Reviewer* (Fall, 1975), pp. 271–304.
20. Ayn Rand, *The Virtue of Selfishness* (New York: Signet, 1964); Eric Mack, "How to Derive Ethical Egoism", *The Personalist* (Autumn, 1971), pp. 736–

- 743; John Hospers, "Rule Egoism", *The Personalist* (Autumn, 1973), pp. 391-395. For a detailed development of the argument relating ethical egoism to natural rights, see my *Human Rights and Human Liberties*. See also, David L. Norton, *Personal Destinies: A Philosophy of Ethical Individualism* (Princeton, N.J.: Princeton University Press, 1976), for a comprehensive philosophical defense of eudaemonistic individualist ethics. It is my view that Norton's ethical theory fully supports the Lockean natural rights position. See my "Natural Rights and Morality", *The American Journal of Jurisprudence*, 1978 (forthcoming).
21. "The Final Good in Aristotle's *Ethics*", *Philosophy*, Vol. XL (1965), pp. 277-295.
 22. I make the attempt myself in my *Human Rights and Human Liberties*, p. 108, and a compact discussion of the epistemological issues related to natural rights may be found in my two papers cited in note 16 (above).
- Several pertinent papers, touching on the various issues Scheffler finds inadequately attended to or untreated by Nozick are discussed at considerable length by the contributors to the special issue on human rights of *The Monist*, October 1968. Interestingly, Ronald Dworkin's recently published *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), fails to discuss any of the topics Scheffler mentions, yet its avowed aim is a full discussion of natural rights. I eagerly await Scheffler's forthcoming thoroughgoing criticism of Dworkin's lack of comprehensiveness.
23. John Rawls, "The Independence of Moral Theory", *Proceedings and Addresses of the American Philosophical Association* (Newark, Del.: University of Delaware, 1975).
 24. Cf., my "Note on Independence", *Philosophical Studies* (December, 1976), pp. 419-421.