

Fishkin on Nozick's Absolute Rights

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In his recent work, *Tyranny and Legitimacy*,¹ James Fishkin advances an argument against Robert Nozick's theory of, what Fishkin calls, "absolute rights"² by trying to demonstrate that such a theory would legitimate tyranny. Very early in the work Fishkin presents the following line of reasoning to accomplish his aim:

Fishkin asks us to imagine that "the Asians [of Idi Amin's Uganda] are not the richest, but rather, the poorest minority."³ He continues:

And suppose further that there is a temporary food shortage that threatens the poorest sections of the country with starvation. And let us imagine that even though food has been stockpiled for just such an emergency, the government — perhaps in realizing that it is only the Asians who would be saved from starvation — does nothing.⁴

According to Fishkin, "Nozick's theory of absolute rights could be invoked by the government to legitimate such a policy of inaction."⁵ This, Fishkin maintains, stems from the fact that "Nozick's theory provides only one basis for evaluating a policy: Does it violate rights?"⁶

Fishkin finds this intolerable. He explains his grounds for this view by noting that "the crucial fact about an absolute rights theory such as Nozick's is that moral prescriptions follow *only* from rights violations."⁷ While Fishkin says that this approach lends to Nozick's theory a "simplicity that provides [it] with much of its appeal," he maintains, also, that this feature of the position Nozick advances "renders it indifferent between alternatives that all avoid violating rights. According to this kind of theory, all such alternatives must be equally good."⁸ To clarify the point further, Fishkin asks us to "compare two alternatives in this case: (a) the policy of saving the Asians from starvation, and (b) the policy of doing nothing. Neither of these policies violates rights in Nozick's sense. There would be no moral issue — in terms of the absolute rights theory — in choosing (b) rather than (a) — even though the Asians would starve, needlessly, if (b) were chosen. On Nozick's theory, we could not be wrong if we chose (b) rather than (a). One must be fully as good as the other. The starvation of the Asians — as long as it does not result from a rights violation — counts for nothing. It is such tyranny — through omission — that would be legitimated by Nozick's theory."⁹

Now that we have Fishkin's argument before us in considerable detail, it is important to notice what is wrong with it because the temptation to reach this conclusion is great among contemporary political theorists.

First of all, by Nozick's theory it would not be possible for any government to engage in stockpiling food other than for purposes clearly related to governmental operations — e.g., for feeding the police or the military in emergency situations. When Fishkin says that we should imagine that "food has been stockpiled for just such an emergency," he introduces a feature into the situation which in terms of Nozick's theory could not be present. Moreover, Fishkin is seriously imprecise when he uses the passive voice. Such passive voice leaves it entirely open who stockpiled the food — e.g., the government, or some people in the country, or the Asians. Had Fishkin said that the government had expropriated the food for an emergency, it would have been clear from the start that the situation violates the Nozickian framework. Had he said that citizens have stockpiled the food for such emergencies, Fishkin could not have maintained later that "a [state] policy of saving the Asians from starvation" would be one that does not "violate rights in Nozick's sense." By simply positing the unexplained presence of stockpiled food, available for the government to distribute, Fishkin leaves his case completely unmanageable from the Nozickian framework. Alternatively, to add a point which may not be clearly implicit in Nozick's own position, if some sort of stockpile exists in the affected region without any violation of rights, there would be no objection from Nozick's framework to giving it away to those who are starving, since doing so would not violate anyone's rights.

To this last point Fishkin's following contention applies. He says that from Nozick's framework "[a] or [b] must be fully as good as the other . . . [because] all such alternatives must be equally good." Yet is this so?

Actually it is here that we can observe the most important flaw in Fishkin's argument. He simply conflates the moral and political dimensions. Nozick, however, makes clear in his book that he is avoiding the moral sphere and will focus only on the political. Thus, while from within Nozick's political framework (a) and (b) are politically neutral, it is clearly false that they "must be equally good."

If, for example, based on a political framework an advocate of freedom of the press and an advocate of censorship are both provided with governmental protection against physical coercion, this does not imply that both advocacies are taken as equally good from the moral point of view. It may well be true that no one should advocate censorship, yet it is also possible that those who do so should be given protection of the law, equal to that given those who advocate freedom of speech.

Nozick leaves the moral question entirely open for one who wishes to commend the advocate of free speech and denounce the advocate of censorship. Similarly, in a country experiencing famine those who share their stockpiled food could be morally commended while those who do nothing could be morally condemned. If the government came into possession of such food without the

violation of anyone's rights — e.g., by finding food growing on some military base — the extra-political actions of the government officials concerning the food would be open to moral appraisal. There is nothing in Nozick's theory that precludes government's giving the food to those who are starving. And there is nothing in his position that requires moral neutrality between giving the food away and doing nothing, either by government or by anyone else.

Fishkin might reply by noting that Nozick has not provided us with a moral framework by which to evaluate such conduct. This is true, except for a somewhat general reference to the morality of "a person's shaping his life in accordance with some overall plan," or "of giving meaning to his life."¹⁰ Nozick does not carry this discussion very far and tells us, in the end: "I hope to grapple with these and related issues on another occasion."¹¹ But this is very far from holding that all alternatives available to a person, including those of helping and of not helping starving people when no rights violation is involved, "must be equally good." The "must" here is entirely gratuitous. Given Nozick's admission that his position has thus far omitted a moral framework and that this omission is serious, to be "grappled with . . . on another occasion," Fishkin's failure to acknowledge that Nozick's view, while silent, is not necessarily indifferent on the moral quality of various courses of conduct, is a serious defect in his discussion of Nozick.

Let me briefly suggest, in conclusion, a way in which Nozick's absolute rights theory can fully accommodate the problem Fishkin poses.¹²

While the Nozickian theory of absolute rights does not authorize government to engage in forcible redistribution of goods and services, it is possible for such a theory to rest on a more fundamental ethical framework which would provide standards for distinguishing between various courses of human conduct, including such as might be open to a person who has stockpiled food available to give or not to give to starving people. Based on that ethical, as distinct from political, framework, it would be clearly false that every course of conduct "must be equally good" and true that some (type of) conduct would be better, morally more appropriate, than another. For instance, if we agree with Locke, as Nozick appears to suggest we at least might, that natural rights are based on the view that there is a law of nature that governs the state of nature, and if that law of nature requires that each person pursue his or her happiness in life, then whatever course of conduct would constitute such pursuit would be morally warranted. Since this moral framework supports natural rights theory, allegedly, it is clear that any conduct that violates natural rights could not be justified by it. But some conduct that does not violate natural rights might also be condemned by it, including the failure to act compassionately, generously, when this is what the pursuit of one's happiness — i.e., the happiness of a human being,¹³ after all — would require.

It seems clear, then, that Fishkin misreads Nozick quite drastically. Moreover, he adds to this error by failing to consider that the normative dimension of human life is capable of being divided into distinctive regions, e.g., the ethical (wherein we ask and try to answer "How should I, a human being, conduct myself?"), the social (concerning "How should I act toward the variety of human

beings near me, e.g., parents, children, friends, colleagues, neighbors, etc.?''), and the political (pertaining to "How are we, human beings, to conduct ourselves toward each other simply in virtue of being human beings within each other's community?"). Whether so construing the situation in the normative sphere is ultimately sound is a very important issue, but it would not be possible to tackle it in this brief discussion.¹⁴

NOTES

1. James S. Fishkin, *Tyranny and Legitimacy* (Baltimore, Md.: Johns Hopkins University Press, 1979).
2. *Ibid.*, p. 6.
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*, pp. 6-7. Notice, no mention is made of *whose* policy!
7. *Ibid.*, p. 7. This point is crucial. For Fishkin: politics = morality.
8. *Ibid.*
9. *Ibid.*
10. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 50.
11. *Ibid.*, p. 51. Nozick's *Philosophical Explanations* (Cambridge: Harvard University Press, 1981) would be the result of these grappings, we may assume.
12. I have developed this approach somewhat more fully in an earlier paper. See my "Prima Facie versus Natural (human) Rights," *Journal of Value Inquiry* 10 (Summer 1976): 119-31.
13. For a discussion of why, when we are considering the pursuit of happiness by a human being, we can accept that such a pursuit would never conflict with the respect for the rights of other human beings, see my *Human Rights and Human Liberties* (Chicago: Nelson-Hall, 1975), pp. 74-75. I should note that although in normal situations no conflict between the pursuit of human happiness and the respect for the rights of others need arise, in some cases a conflict might arise. But when this occurs, it is possible to retain the integrity of a system by denying that there is any need for abandoning the appropriate political framework, even while it would be appropriate to counsel the moral propriety of acting against or in breach of that framework. For a discussion of such emergency situations see my "Prima Facie versus Natural (human) Rights"; and two papers by Eric Mack, "Egoism and Rights," *The Personalist* 54 (Winter 1973): 5-33, and "Egoism and Rights Revisited," *The Personalist* 58 (July 1977): 282-88. Fishkin's work is marred, additionally, by his conceptualization of the normative sphere along what could be called geometrical lines, so that unless some mathematically inflexible relationship may be identified to hold between the various areas of a normative framework, it must be considered inadequate. There is no room in such a conception of normative adequacy for emergency provisions such as judicial discretion.
14. I have been helped in considering the issues in this note by several discussions I have had on these and related topics with Rolf Sartorius and Eric Mack, though they are not responsible for anything in this paper. I wish to thank the Reason Foundation for enabling me to work on this paper.