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Summary Discussion of Negative Rights

Negative rights are essentially the right to non-interference in one's endeavors to secure one's needs and wants while positive rights are the right to have at least some of one's needs and wants provided by a social group, government, or other agency. Negative rights are rights to liberty, and libertarians claim that only negative rights can be defended or protected, and positive rights or entitlements are gained only through the just acquisition of goods. In this framework, a clean environment and humane means for earning a living are goods that must be acquired through an individual's free exercise of will or initiative. Libertarians claim that no one has an obligation to provide these goods, although it might be nice if some sympathetic and well-meaning individuals desire to do so of their own initiative.

It is notoriously difficult to argue the ontological status of human rights, especially without an appeal to some right-granting divinity who has endowed humans with special rights or simply claiming that humans are entitled to natural rights derived from nature. Arguments for negative rights are secular but also difficult to defend ontologically. It would be nice if rights, like planets or viruses could be empirically verified, but it is hard to imagine someone "discovering" a human right, though certain positivists have claimed such a discovery is possible. Even without empirical verification, though, most people in the West recognize the existence of negative rights. While popularity of a moral theory is certainly not a way to determine the morality of any action, negative rights have achieved a level of respect in my culture that positive rights do not enjoy. If I can defend a right to health care in the language of libertarians, I increase my chance of achieving greater consensus.

Libertarians claim that negative rights entail only negative obligations, requiring nothing of individuals but to leave others to their own devices. The writers I discuss in this paper and I claim that negative rights often entail positive duties such as the duty to provide security, and it is useful to identify such instances where libertarians would likely agree that all rights require positive duties. Given that some positive duties are entailed in libertarian claims, it seems reasonable to suggest that further positive obligations should be considered.

One of the most often cited philosophers defending the libertarian view is Robert Nozick. In his final book, *Invariances*, Nozick describes the required level of ethical obligations to include "rules and principles mandating respecting another (adult) person's life and autonomy, forbidding murder and enslavement, restricting interference with a person's domain of choice, and issuing in a more general set of (what have been termed negative) rights."¹ Nozick goes on to describe three higher levels of ethics: ethics of responsibility, ethics of caring, and the ethics

¹ Robert Nozick, *Invariances: The Structure of the Objective World* (Cambridge, MA: Belknap Press of Harvard University Press, 2001), 280.

of light.² Of these higher levels of ethics, he says, “I do not say that the ethics of each higher layer is more obligatory. It just is lovelier, and more elevating.”³ Actually, Nozick believes the higher levels of ethics must never be enforced by a state or even by social disapproval of individuals.⁴ Within Nozick’s framework, any well-off individual is free to provide any benefit whatsoever to anyone at any time so long as its provision is based on a free choice. He describes most instances of unequal distribution of income as the result of free choice.

One problem with this conception of liberty is that some people lack basic resources as a result of factors unrelated to their own free choices. Some are hampered in their pursuit of essential goods by bad luck such as natural disasters or impaired health while others are hampered by acts of injustice such as theft, assault, and so on. For a libertarian such as Nozick, someone’s bad luck may be tragic, but it imposes no obligation on others to change the situation. If someone (Nozick suggests Wilt Chamberlain) has more assets as a result of superior talent, physical fitness, and drive, there can be no defensible reason to require this person to give away assets gained as a result of superior talent or hard work.⁵ In this example, gaps in income result from free choices made by some people paying their income for the privilege of seeing another individual perform, placing no obligation on the performer to correct or mitigate the resulting income gap. Of course, in reality, people who pay to see basketball games tend to have the resources to meet their basic needs for survival. Others lack resources because their property was stolen from them. In such cases, Nozick would claim the property should be returned as the victim’s liberty has been violated. Ensuring that people are protected from assault or theft imposes a duty on us to provide law enforcement, courts, and jails or other means of deterring or limiting criminal behavior. Nozick acknowledges that it is the role of government to ensure basic security.⁶

Nozick appears to run into trouble, though, when considering the case of historical injustice. If someone is descended from a well-off family whose fortunes were plundered by thieves in a previous generation, it seems clear that this person deserves repayment of the family fortune. Even when there is no theft of property, an injustice occurs when poverty is the result of the denial of basic liberties as in the case of slavery. Slaves are denied the ability to participate in trade for mutual benefit, and their resulting poverty is passed from generation to generation. In his earlier work, *Anarchy, State, and Utopia*, Nozick asks, “If past injustice has shaped present holdings in various ways, some identifiable and some not, what now, if anything, ought to be done to rectify these injustices?”⁷ He does not answer the question, says there is no theory to address this problem, and declines to provide one. In a footnote, he says, “If the principle of rectification of violations of the first two principles yields more than one description of holdings, then some sort of choice must be made as to which of these is to be realized. Perhaps the sort of

² Ibid.

³ Ibid., 282.

⁴ Ibid., 282 – 283.

⁵ Robert Nozick, *Anarchy State and Utopia* (USA: Basic Books, Inc., 1975), 160-164.

⁶ Nozick, *Invariances*, 281-282.

⁷ Nozick, *Anarchy*, 152.

considerations about distributive justice and equality that I argue against play a legitimate role in *this* subsidiary choice.”⁸ Although this would appear to be a substantial problem for his theory, Nozick declines to provide a theoretical response to the question he has raised, at least in *Anarchy, State, and Utopia*.

In *Invariances*, he gives a slightly more robust description of historical distributions of wealth, although nagging problems remain. In this book, Nozick conceives of cooperation to mutual benefit as the core of ethical demands for society saying his view “makes mandatory the widest voluntary cooperation to mutual benefit; it makes only that mandatory; and it (in general) prohibits interactions that are not to mutual benefit, unless these are entered into voluntarily by all parties.”⁹ The preceding quotation makes the use of “voluntary” and “mandatory” seem nearly incoherent, but, being charitable, we can assume that each person is obligated to expand the circle of cooperation without dictating specific choices one must make. In Nozick’s conception, it is possible to imagine two groups who have not interacted in the past; one group may be newly arrived immigrants with fewer resources than members of a socially prominent native group. Nozick notes that initial exchanges will leave wide disparities between the income of the two groups as a result of the unequal starting positions for the people in each group. Over time, though, each group has the possibility of gaining more resources and engaging in more equal exchanges. Each exchange is just so long as no group is involuntarily left worse off. He says, “The new distribution need only surpass what each got under the old distributions for cooperation to be mutually beneficial.”¹⁰ In this description, Nozick adds a troubling note parenthetically. He notes, “Because African Americans were brought to the United States in slavery and subject to strong caste restrictions afterward, their subsequent history, unfortunately, has been different.”¹¹ His comments in both books seem to leave open the possibility that reparation payments for slavery or some other form of compensation is demanded by his theory. If he believes such reparation is demanded, he does not explicitly state it. Other than the problem of rectifying the injustice of slavery, Nozick’s view raises other problems. If one group of people has no resources at all and faces starvation, any goods given to them would make them better off. Such people are ripe for extreme forms of exploitation. For example, one might promise to provide a small supply of food for a person in exchange for 16 hours per day of labor in dangerous conditions. While this condition is arguably an improvement over starving to death (some may even disagree with this), I argue that such exploitation is unethical and deserving of social disapproval and prohibition.

Nozick’s discussions of historical injustice are of particular importance. Nozick rejects any state-imposed redistribution of wealth, but implies that past injustices must be redressed. If much of the poverty we see in contemporary society is the result of past discrimination, then it would seem that Nozick is obligated to support exactly the kind of redistribution of wealth that he is arguing against in the example of the basketball player. If it is no longer possible to identify

⁸ Ibid., 153.

⁹ Nozick, *Invariances*, 259.

¹⁰ Ibid., 261.

¹¹ Ibid., 262.

each past injustice with certainty, this should motivate us to make general allowances for all of the worst off in society.

James Sterba challenges libertarian notions of rights in his book, *Justice for Here and Now*.¹² Sterba begins this discussion by recognizing that libertarians feel it is the privilege of the rich to do with their resources as they please, without interference from the poor or anyone else. This is a negative right also described as the liberty of the rich. However, he notes that we could claim that the poor have a negative right to the liberty to take the basic resources they need from the rich without interference. In so doing, he has blurred the distinction between negative and positive rights, but he acknowledges that libertarians would reject the claim that these statements of negative rights are equal.¹³ His claim, then, is that there must be some way to distinguish between competing liberties (in this case the liberty of the rich to keep what they have acquired and the liberty of the poor to take what they need). He first notes that it is not reasonable to require someone to do something the person is incapable of doing (for example, he says that being in a coma prevents one from having any other obligations, as those obligations are impossible to fulfill.)¹⁴ In addition to actions that are impossible, he makes a more controversial claim that it is unreasonable to make certain demands of certain people. With this in mind, he says it is reasonable to ask the rich to sacrifice their liberty to maintain their wealth and resources while it is unreasonable to ask the poor to not exercise their liberty to take from the rich the basic resources necessary for their survival. In other words, the rich are capable of sacrificing some of their wealth to ensure the survival of the poor, but it is impossible for the poor to live without the basic necessities for survival. As a result, the poor have a legitimate claim against the rich, but the rich have no legitimate reason for refusing to aid the poor. The rich may provide assistance to the poor, however, by offering them employment, and he claims the poor are obligated to take advantage of any opportunity to work. Thus, the obligation of the rich to sacrifice their wealth is reduced as the opportunities for fruitful work are increased.¹⁵ Sterba successfully confounds many of the common arguments of libertarians, who often claim that altruism is good but not obligatory. He notes that when the poor do not take surplus wealth from the rich, they are being altruistic in the sense that they are sacrificing their well being for the benefit of the rich. Since any social arrangement requires either the rich or the poor to be altruistic and to sacrifice a degree of liberty, society should be arranged so that the poor either have opportunities to work to provide for themselves or the rich should sacrifice some of their liberty to hoard excess wealth in order to provide for the basic needs of the poor.

Sterba has attempted to rob libertarian arguments of their power to diminish the rights of the poor to demand their basic needs. If libertarians refuse to recognize any obligations stemming from altruism directed to the poor, then he notes that it is absurd to demand that the poor be altruistic toward the rich. In his conclusion, he puts quotation marks around the words “negative” and “positive,” and suggests that the rich and poor can work out what is morally right

¹² James P Sterba, *Justice for Here and Now* (Cambridge, U.K: Cambridge University Press, 1998), 44 - 76.

¹³ *Ibid.*, 45.

¹⁴ *Ibid.* 46.

¹⁵ *Ibid.* 51.

in a libertarian framework.¹⁶ He concludes, “In such societies where basic human rights have been denied, certain criminally disobedient acts thereby become morally permissible, and existing legal authorities have no right to punish them. Rather than punishment, the appropriate corrective in such cases is to make the changes required to guarantee just those basic human rights which have been denied.”¹⁷

Extreme poverty alone is often enough to rob individuals of their ability to carry out revolutionary actions such as those advocated by Sterba, but illness reduces their power even further. The value of Sterba’s argument is that he helps us imagine a way to express the right to freedom from poverty in ways that confound any attempt to restrict rights only to negative rights. If his arguments are accepted, those who are relatively well off are given an impetus to fight for the basic needs of those who have no power at all. Sterba’s discussion applies only to certain societies; he does not consider the global implications of his argument. For the millions in the world who are starving to death, the liberty to take what they need for basic survival can never be more than a thought experiment. Only more powerful citizens of the world have the ability to guarantee their basic needs are met. Meeting their needs, then, requires an act of altruism, recognition of a positive obligation to help them, or recognition of a past injustice that must be redressed. Of course, for those who cannot fight for their own survival, those of us who can are obligated to do what we can to ensure their basic needs are met.

In his essay titled “Enforcing Economic and Social Rights,” Osvaldo Guariglia points out that although negative and positive rights and duties are assumed to have corresponding negative and positive obligations, all rights, whether negative or positive, entail positive duties. He quotes Henry Shue to argue that negative and positive rights are grounded in parallel arguments and that without guarantees of subsistence, no other rights at all can be exercised. Therefore, guaranteeing positive rights is essential to providing protection for negative rights.¹⁸ In addition, rights and duties are not neatly corresponding by kind (negative and positive). Often, negative rights entail positive duties. While citizens have a negative right to be left alone and secure in their freedom from assault, he says, “public agents and judges have a special *positive* duty to protect and ensure people’s security and integrity.”¹⁹ Similarly, state actors and individual citizens have a negative duty to refrain from any actions that will harm the worst off. He notes that everyone must share the duty to ensure the security of the state and refrain from actions that harm the worst off, such as degrading water or soil or engaging in corruption.²⁰ Of course, participation in a social system that privileges some individuals over others would harm the worst off. Rather than arguing that social and economic rights are negative rights, Guariglia claims there is an interdependence between positive and negative rights that prevents one from being privileged over the other.

¹⁶ Ibid., 181.

¹⁷ Ibid.

¹⁸ Osvaldo Guariglia, “Enforcing Economic and Social Rights” in *Freedom from Poverty As a Human Right*, ed. Thomas Pogge (Oxford, UK: Oxford University Press, 2007), 345 - 357.

¹⁹ Ibid., 348.

²⁰ Ibid., 351.

While the poorest members of society share in an obligation to protect overall security by refraining from actions that harm others and taking positive actions to ensure that others are free to exercise their liberty to the greatest extent possible, the poorest must also be protected from harm and limits on their exercise of freedom. Economic and social rights are essential to the overall security of society. The full exercise of negative rights demands positive duties we must all share.

Onora O’Neill’s essay, “Lifeboat,” examines the distinction between killing someone (violating their negative right to be left alone) and letting someone die (not fulfilling a positive duty, if one exists, to provide assistance).²¹ She begins by assuming that persons have a right not to be killed and a corresponding duty not to kill, and she make no assumptions beyond this. She also notes that there are exceptions to the prohibition of killing and the right to be left alive. Killing is justified in cases of self-defense and unavoidable killing. An unavoidable killing might occur when someone steps in front of a train after it is too late for the operator to stop the train.²² Given these assumptions, she argues that if several people are on a lifeboat that has sufficient supplies to enable everyone onboard to survive until rescued, anyone who denies supplies to any passenger of the lifeboat is killing that person. In other words, failure to provide the basic needs for survival is tantamount to murder. In this way, a negative right to not be harmed entails a positive duty to provide essential supplies. She recognizes various situations where it might be justified to kill one passenger. If the lifeboat is well equipped, it is justified to kill someone who is threatening to jettison supplies and cause the deaths of other passengers. On an underequipped lifeboat, decisions must be made about which passengers might be allowed to die.²³

The lifeboat may not be a perfect metaphor for the earth, as O’Neill acknowledges, but her metaphor raises questions for the situation we now face on earth. O’Neill imagines that each individual on the lifeboat has an equal right to the supplies, but people on earth claim property rights that they feel entitle them to consume resources even when others are denied. Further, some people on earth are enabled to consume more only by denying resources to others. The wealthy consume, but the burden of their consumption rests on the backs of the poor. Denying individuals the resources necessary for basic survival is killing. Claims on property by some over others would have to be justified, and this is sometimes difficult, especially when people use the resources of distant countries without sharing the benefits with those who live in those countries. Unequal distribution can result, as previously noted, from bad luck or from injustice. If people are unable to access health care because their resources have been stolen, they are victims of injustice even according to the most ardent libertarian arguments. However, even if they are victims of bad luck, O’Neill provides a way of conceptualizing their suffering as harm done to them by those who have the resources to save them. She avoids distinguishing between negative and positive acts, saying, “Such attempts seem unpromising since any act has multiple

²¹ Onora O’Neill, “Lifeboat” in *Global Justice: Seminal Essays : Global Responsibilities*, Thomas Pogge and Darrell Moellendorf, eds. (St. Paul, MN: Paragon House Publishers, 2008), 1 - 20.

²² *Ibid.*, 2.

²³ *Ibid.*, 5-6.

descriptions of which some will be negative and others positive.”²⁴ Nonetheless, withholding resources is a familiar example of a “negative” act in the literature on rights and duties. By labeling denial of resources as a positive act of killing, O’Neill reframes one of the central tenets of the libertarian argument. She shows that it is not only possible to view entitlements as the products of negative rights, but she also shows that refusal to aid the poor can be seen as a positive act of violence.

Thomas Pogge has attempted to provide a robust and thorough defense of social and economic rights while not denying the minimalist claims of libertarians. In fact, he says he agrees with libertarians that the distinction between causing poverty and failing to prevent it is morally significant. He says, “Thus, I invoke and explicate both human rights and justice for the limited purpose of supporting negative duties, that is, duties not to harm that impose specific minimal constraints . . . on conduct that worsens the situation of others.”²⁵ He argues that poverty and inequality in the world have not resulted from benign neglect but from harmful actions of the world’s affluent populations. In order to fulfill our negative duty not to harm, then, we must actively work to change social institutions that unjustly harm the poor. Similar to arguments discussed above, he claims that negative rights entail positive duties.²⁶

Pogge claims that it is essential to separate human rights from claims to legal rights. His arguments are pragmatic, in the common sense of the term. He points out that sometimes a right is fulfilled even in the absence of legal codification. As an example, he says that if everyone in a given society has access to enough food, a legal guarantee of access to food is not needed. On the other hand, legal guarantee of methods to redress abuses of employers is of little value to those who lack the means to hire lawyers or otherwise pursue redress for abusive treatment.²⁷ He further notes that laws can be an effective way to guarantee rights but also that certain rights are secured in some places without corresponding legal rights. By avoiding a reliance on legal rights, he hopes to propose a system by which human rights can be “juridified” in international law.²⁸

Pogge sees human rights as a progression from natural law to natural rights to human rights. Each progression entails a narrowing of content, but it is the content of human rights and their attendant obligations that are of interest here. First, human rights are secular and, therefore, can be shared by humans of different faiths. Second, human rights are political rather than metaphysical. Third, human rights apply to humans and only humans. Finally, human rights are claims only against certain actors.²⁹ The final point is the least clear. Pogge says that though a right to one’s property may be a human right, a petty thief stealing a car is not violating human rights as Pogge conceives them. He says, “Human rights can be violated by governments, certainly, and by government agencies and officials, by the general staff of an army at war, and probably also by the leaders of a guerilla movement or of a large corporation—but not by a petty

²⁴ Ibid., 19.

²⁵ Thomas Winfried Menko Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Cambridge, UK: Polity, 2008), 15.

²⁶ Ibid.

²⁷ Ibid., 51.

²⁸ Ibid. 52-53.

²⁹ Ibid. 63-64.

criminal or by a violent husband.”³⁰ He says his conception of human rights derives from the fact that humans have basic human needs that give rise to “weighty moral demands” and that each need is the “object of a human right.”³¹ Given the staggering number of people who die as a result of extreme poverty, “weighty” seems an understatement.

Given his stated agreement with libertarian arguments for negative duties, Pogge is obliged to respond to libertarian critiques of social and economic rights. He begins his response with a claim that a right to some good means that society should be organized so that each person has access to that good. For most libertarians, it would be enough for each individual to refrain from doing anything to block access to any available good; it would not require that individuals make an active effort to guarantee access. For Pogge, this does not mean that any particular individual is responsible for providing the good as in the form of an entitlement, but that all individuals, collectively, are responsible for creating social arrangements that ensure secure access to the good for everyone.

Pogge claims that his conception of human rights does not violate libertarianism’s tenet that human rights entail only negative duties. Rather, he claims that the human rights of others require us to refrain from helping to sustain any social order that denies rights to others; for example, we are prohibited from supporting institutions in which “blacks are enslaved, women disenfranchised, or servants mistreated.”³² Those whose rights are denied have a claim not against everyone but only against those who actively participate in an unjust social order. If individuals cooperate in such a social order, they are obligated to compensate by protecting victims or working for reform.

Pogge responds also to the claim that social and economic rights are mere “manifesto rights.” He views the term as ill-defined and polemical but offers a definition of manifesto rights. These are rights that are not realized, leave unclear who should guarantee them, and cannot reasonably be met. He gives the example of the “right” to a happy love life. As no one can guarantee a happy love life, this is a manifesto right, but he thinks it can be reformulated as a legitimate rights claim. If we see that cultural biases and taboos prevent people from securing a happy love life that would otherwise be possible, then we have an obligation to remove those barriers, and the right to a happy love life is reconceived as a right to live in a society with no obvious obstacles to achieving a happy love life.³³

Pogge argues that his conception of rights can help to give a common language to western countries that emphasize political liberties over economic and social rights and socialist and developing countries that view human rights primarily as economic and social rights.³⁴ Arguments will persist, of course, over what goods we are obligated to provide based on this idea of human rights, but an argument over what goods must be provided is a step forward from arguments between two competing conceptions of rights.

³⁰ Ibid.

³¹ Ibid., 64.

³² Ibid., 72.

³³ Ibid., 73-74.

³⁴ Ibid., 76.

Under any theoretical framework, health emerges as an essential human right. A Rawlsian conception of justice demands care for the worst off; Utilitarians such as Peter Singer posit that we must all sacrifice to save the poorest people in the world; and the capabilities approach of Martha Nussbaum and Amartya Sen also demand that we do what we can to promote human flourishing. It is libertarians and ethical egoists who are most likely to insist that the affluent have no obligations to the poorest members of society. The attempt to formulate a right to health in libertarian terms is an attempt to respond to libertarians on their own terms.

In addition, though, the argument from negative rights stresses that for many of the least advantaged people in the world, ill health is the result of injustice. Even Robert Nozick does not deny the obligation to redress harms caused by past injustice. While some of the world's poor have surely made choices that led to their poverty, many have become poor as the result of victimization by colonization, corrupt governments, greedy corporations, or petty thieves. These harms must be redressed.

Others have become poor because of bad luck. They may be limited by disability or illness, or they may have had their fortunes destroyed by natural disaster. Their plight may not be the result of unjust social arrangements or of past injustice. The argument from negative rights may not address the needs of all individuals. Other arguments for meeting the needs of the disabled and others who have had bad luck may be needed to justify helping them. Nonetheless, it is to point out that much inequality in the world is the result of a violation of negative rights as conceived by libertarians. While it may not be convincing for everyone, it provides a common language for discussions of rights that can be fruitful.