RIGHTS PATERNALISM and THE STATE
A KANTIAN EXPLORATION OF NOZICK’S POLITICAL THOUGHT

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Method of Citation

Citations to Nozick’s *Anarchy, State, and Utopia* are given parenthetically. Citations to all other works (including those by Nozick) are given in footnotes where only the author’s last name and the title of the work is employed (subtitle not normally stated); complete references to be found in Works Cited. With regard to Kant’s works, citations are first to the Akademie-Ausgabe (= AA), followed, with a “/” in between, by reference to the English translation I have used. The German text is drawn from editions of Kant’s works published by Felix Meiner Verlag. In my text and footnotes I employ the German title of Kant’s works; in Works Cited, however, translations only are listed. In order to do more justice to the original, I have often inserted parts of the German text (in [ ... ]) into the translated English text. In this work, the normal “p.” preceding the page number has been omitted; unless otherwise stated — “ch.”, “sect.”, “n” and “fn” — numbers refer to page number.

Introduction

“Why are philosophers intent on forcing others to believe things? Is that a nice way to behave toward someone?”

— Robert Nozick, *Philosophical Explanations*

§ 1: Approach of my work: using Kant as a “mere means”

The present dissertation tries, in some of its most important portions at least, to “wrap up” Nozick’s political philosophy in a Kantian framework for interpretation. (The reasons for my choice of this particular framework to be given in Ch. 1.) My strategy has one particular advantage and one particular disadvantage. “The good news” is that looking at Nozick through Kantian spectacles enables me to offer a new reading of Nozick in several respects. Or so I shall maintain. The *basis* of this is a close textual analysis of Nozick’s political philosophy. In dealing with other authors, I disclose the eclectic’s attitude: other authors’ works are employed mainly for casting light on various Nozickian positions. And here is where “the bad news” comes in: such is my attitude towards Kant’s works too. I select material from Kant as I see fit. So one could say that he is being used as a mere means here.

To Kantians, that might be inexcusable. But it is a comfort to note that I am here following the respectable tradition of Nozick, who does not seem to be bothered at all by the fact that he picks out of Kant — and Locke — whatever he thinks is of use for his own purposes. To the Serious Interpreter, doing so with the text of any great philosopher might be some sort of infidelity to that philosopher’s text. Nonetheless, such “careless” philosophizing has, as I said, its
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advantages, too. Furthermore, I don’t subscribe to the point of view that one should always submit a text to careful textual analysis throughout. Yet if one doesn’t so submit a text, one should be clear about that one doesn’t and about one’s intentions in not doing so — as I hope I am here.

Another hope of mine is that I have somewhere managed to present a new reading of Kant too. If one throws light at a philosopher with the aid of another, some of the light will inevitably get reflected back onto the spotlight itself. Occasionally, then, I don’t just offer a Kantian reading of Nozick but *vice versa* too — like, for example, when I (in Ch. IV) make a Nozickian judgement of Kant’s ideal “minimal state” as laid down in his *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*. My Kantian exploration (as I call it) of Nozick thus sometimes is transformed into its “negation”: a Nozickian exploration as regards Kant. I would however like to do much more on Kant were it not for the limitations of both time and space I have been working under. In a future work of mine I intend to, as opposed to now, enthrone Kant’s practical philosophy — in particular *Metaphysische Anfangsgründe der Rechtstlehre*.

§ 2: The discussion’s fixing points: rights and paternalism

In this work, two concepts are employed for service as “fixing points” that help delimit the range of my discussion: *rights* and *paternalism*. Now at face value this admittedly doesn’t look like a very promising way to limit a discussion of what’s Kantian — and what’s not — in Nozick; rather, it looks like an enormous expansion. But the following strategy works to the effect that what is before the reader is, after all, quite limited in range:

Although I make extensive efforts to extract what Nozick’s conception of rights amounts to — something which is not made very clear by him — I avoid becoming entangled in the controversy over whether there are any natural rights, and if there are, over exactly what a natural right is. Instead, my perspective is roughly like this (in Ch. II): assuming that humans enjoy the natural rights that Nozick says we have, how are we to understand his conception of rights and which points of view may be said to follow from the conception? As for paternalism, what I have to say on this vast topic relates on the whole to Nozick’s nonpaternalistic — as opposed to antipaternalistic — position (Ch. III), but it also relates to Kant’s antipaternalistic position. The very concept paternalism is given a condensed treatment.

§ 3: Philosophy as “exploration”

The subtitle of this work contains the word “exploration”. I would like to emphasize the bearing this word has upon it. In *Anarchy, State, and Utopia* Nozick writes that the book “is a philosophical exploration of issues, many fascinating in their own right, which arise and interconnect when we consider individual rights and the state. The word ‘exploration’ is appropriately chosen. ... I believe that there also is a place and a function in our ongoing intellectual life for a less complete work, containing unfinished presentations, conjectures, open questions and problems, leads, side connections, as well as a main line of argument. There is room for words on subjects other than last words.” (xii) This statement aptly captures my own attitude in the present work. Sometimes I will follow a philosophical problem and take flights into related topics and speculate about them. But such is my conception of philosophy, anyway: philosophy is “speculative” — and ought to be, provided what one says is argued for. One should dare to take philosophical flights since philosophy not only begins with wonder (as Aristotle said) — and is kept alive by it — but also because it begins with and is kept alive by the urge to speculate. (It has been said that a philosopher is like an adult who, because he never tires of asking questions that other adults would consider both childish and strange, is stuck in his childhood. I myself feel comfortable with such an self-image.)

Allowing oneself to “free oneself” from the considered texts is an essential thing in a doctoral dissertation: it ought to, as far as possible, be a work of the candidate, and it can be difficult to detect him in a work in which referring to other authors is the overall activity. In this work, I develop several arguments — or “speculations” — of my own making. In so doing, I put my philosophical ability (assuming that there is such) to the test in a more thoroughgoing sense than were I to “play it safe” by mainly drawing attention to commentators’ works and how they disagree or agree amongst themselves. It will be easier, then, for the readers to see where I am wrong. Where I am, hopefully I am sometimes eminently wrong.

§ 4: Philosophical truth

At a general level, I also line up with Nozick when he goes on to say that, “Indeed, the usual manner of presenting philosophical work puzzles me. Works of philosophy are written as though their authors believe them to be the absolutely final word on their subject.” (xii) What in particular puzzles me about this is how a *philosopher*, a “lover of wisdom”, can be so unwise as to fall into
the trap of believing so. (Though it should perhaps be admitted that while “the word philosophy means the love of wisdom, ... what philosophers really love is reasoning.” Still, if it is reasoning that philosophers really love they will see that for reasoning to come to an end, history must come to an end too. Last words on a subject will thus be so literally.) Also, a person who thinks that he has found the truth easily falls into the slippery slope of dogmatism. And whatever one thinks philosophy should amount to, dogmatism isn’t the word one would be looking for.

In the Tractatus, Wittgenstein writes: “A philosophical work consists essentially of elucidations.” In the Preface to Philosophical Investigations he writes that, “I should not like my writing to spare other people the trouble of thinking. But, if possible, to stimulate someone to thoughts of his own.” I subscribe to both points of view, and so I am not asking the readers to accept what I say on various issues as the truth about these issues. Rather, I propose my philosophizing as a vehicle that may help them to think more deeply about them. But if it doesn’t yield such thinking in anyone, or only in a few, that is all right with me. It is also all right with me if people find philosophy a waste of time and completely useless to them; if they, to alter slightly Bentham’s phrase, “prefer pushpin to philosophy”, say. This in no way implies that I believe in the universal truth in Wittgenstein’s remark that, “Philosophy ... leaves everything as it is.” It would be some claim to claim, for instance, that none of the political philosophy since the times of Plato has contributed, in one way or another, to importantly shaping the political ideas and institutions in the West — and thus the democratic framework within which we live. To those who want to claim something like that I gladly offer the burden of proof.

§ 5: Why Nozick?

Anarchy, State, and Utopia gave rise to a lot of criticisms. “Also”, writes Jonathan Wolff, “it is rare that a single work has managed to challenge so many received views.” Apparently, some philosophers were also emotionally provoked by it; Brian Barry, for example, wrote that Nozick, “from the lofty heights of a professorial chair, is proposing to starve and humiliate ten percent or so of his fellow citizens (if he recognizes the word) ...” However, Nozick decided not to engage in the debate on his book at all. In the striking words of Alan Ryan: “Nozick essentially threw his libertarian bomb into the lecture room and walked away from the explosion. ... and never attempted to develop his ideas so as to rebut his innumerable critics. ... Rather, we got a dazzling display of pyrotechnics, ...”

Even though Nozick thus left the field of political philosophy, he re-entered it for a brief comment on his libertarianism in “The Zigzag of Politics” (1989). But he does not there address any of his critics; rather, he confines himself to self-criticism and rejects his former position: “The libertarian position I once propounded now seems to me seriously inadequate, ...” This confession is however not accompanied by the presentation of a new theory to replace the old one. Nozick is quite clear (in a footnote) that this is not his intention: “In these remarks I do not mean to be working out an alternative theory to the one in Anarchy, State, and Utopia, or to be maintaining as much of that theory as possible consistent with the current material either; I am just indicating one major area — there may be others — where that theory went wrong.” Neither in Philosophical Explinations (1981) nor in The Nature of Rationality (1993) will one detect any substantial argument designed to demolish the libertarian position. In the latter work he just reviews the core argument of his previous rejection: “The political philosophy presented in Anarchy, State, and Utopia ignored the importance to us of joint and official serious symbolic statement and expression of our social ties and concern and hence (I have written in “The Zigzag of Politics”) is inadequate.” (I explain the meaning of this statement in Ch. IV.) None of this means, however, that the later works aren’t helpful in one’s understanding of the libertarian position. As we shall see, in various places, they are — in particular Philosophical Explinations, and especially as far as the

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1 Nozick, The Nature of Rationality, xi.
2 Wittgenstein, Tractatus, A 112.
4 Ibid., sect. 124.
5 Wolff, Robert Nozick, 139.

8 Nozick, “The Zigzag of Politics”, 286-287.
9 Ibid., 287, fn.
10 Nozick, The Nature of Rationality, 32. Notice that in “The Zigzag of Politics” (cf. the quotation above) Nozick says that his former libertarianism seems (seriously) inadequate, whereas he here says that it is inadequate. Are these just two slightly different ways of stating the same point of view, or may we take this difference in language to indicate that Nozick has become even more critical towards “The political philosophy presented in Anarchy, State, and Utopia”? 
conception of rights is concerned. But works predating the libertarian position are relevant too: crucial to the Nozickian conception of rights is the article “Coercion” (1969) (since which there has been a steadily growing literature on coercion), and “On the Randian Argument” (1971) provides material relevant to that conception.

Some might think it a waste of energy to write a work on Nozick’s libertarianism because of his more recent rejection of it. I disagree. Although the “later” Wittgenstein rejected much of his former philosophical self — the *Tractatus*, he wrote, contains “grave mistakes”¹¹ — no one would seriously suggest that we need not discuss his earlier work, neither in its own right nor in relation to the writings of the later Wittgenstein. Apart from this, he even saw that his own propositions were meaningless, and told his reader to “throw away the ladder after he has climbed up it.”¹² Should we then simply throw away his philosophy after reading it, or should we take a closer look at it? Certainly a philosopher will take a closer look. (In view of the vast number of commentaries on Wittgenstein’s philosophy it is very clear that his followers haven’t been able to throw away the ladder.) And which philosopher would dismiss Plato’s Theory of Forms altogether — regardless of whether the philosopher himself believes in the theory or not — just because Plato became more and more sceptical towards it as he grew older? Furthermore, is there something about self-criticism that necessarily makes it a good thing? When we hear of someone criticizing his former self or points of view we applaud because we think well of the attitude displayed in the person doing so. But then it is easy to ignore the possibility that he might exercise misguided self-criticism. (Some remarks on this point may be found in Ch. III.)

From the perspective of pure critique and reflection, no philosopher with an interest in political and moral matters should deny himself acquaintance with Nozick’s libertarianism. Nozick has many interesting things to say on issues central to political philosophy and moral philosophy, and he says those things in an elegant, lively and personal way, utilizing “‘flashy’ tools” (x) of philosophical investigation. One issue here is, of course, “the idea of rights, to which [Nozick] gave a new currency among analytical and other thinkers”, observes Philip Pettit.¹³ Richard Tuck even claims that, “With the exception of Robert Nozick,


...no major theorist in the Anglo-Saxon world for almost a century has based his work on the concept of a right, ...”¹⁴ Even if a philosopher is interested in the issue of rights only, then, he has every reason to get a copy of *Anarchy, State, and Utopia*.

My general reception of this work is that it is, in many respects, one of the most important contributions to contemporary analytical political philosophy; one may say that in that field it has gained, already, the status of a classic alongside Rawls’ *A Theory of Justice* (apart from which one shouldn’t read Nozick’s book). Having said that, I am quite critical of it in places; for example, I argue that its conception of a political system and of politics is unsatisfactory (Ch. IV). Yet, my being critical doesn’t always entail that I don’t subscribe to the criticized view myself; there are stances in Nozick that are problematic but defensible nonetheless. (Personally, I also hold views that I realize are problematic, but I hold them nonetheless.)

If one merely looks for what’s wrong with a philosophical stance, one will never search in vain. And if one is sufficiently unsympathetic towards a position, the job will be easy. I often — much too often — find myself reading works of philosophy that do their best to make the positions they oppose seem nearly incredible; one is left wondering how on earth somebody could possibly hold such positions as those criticized. What is more, it is a mystery how celebrated philosophers can be such lousy thinkers. These reactions ought to be a warning that very likely one should have spent one’s money on some other book by some other philosopher. None of Nozick’s works make me feel like this. He is a great rhetorician, but in the positive sense: beside being enlightening, his criticisms are often amusing, but he manages, in my judgement, to treat writers with whom he disagrees with respect nonetheless. A good example is his extensive treatment of Rawls’ *A Theory of Justice*. (183-231)

In the present work it is my intention to try to find out what Nozick’s position amounts to on the subjects I have chosen for exploration. Hence I often try to bring out arguments and presuppositions that he keeps to himself. Occasionally, this strategy will make it look as if I am defending various Nozickian positions. But that need not necessarily be the case. (Nor need it necessarily be the case that I disagree with Kant every time I present some of his views in a critical voice. I have no problem with admitting, though, that in general I probably do more justice to Nozick than to Kant. That is probably so because my work is mainly an

¹⁴ Tuck, *Natural Rights Theories*, 1.
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exploration of the political writings of the former philosopher.)

I should say that it is no easy task trying to “unnack” various Nozickian positions, but it is easy to feel unsure whether one has actually managed to state what they are. Anarchy, State, and Utopia is tough reading, and there are many complex issues and arguments in it that I shall not even mention. The following long-drawn sigh, extracted from Jonathan Wolff’s introductory book to Nozick’s political philosophy, may serve as a warning to the reader of both Nozick and the present work of mine:

to reconstruct Nozick’s arguments and conclusions to make them as coherent as possible ... is not always a simple matter, for Nozick’s intellectual enthusiasm shows itself in a tendency to take up at length any interesting side issue, and thus it is not always clear what is the argument and what the digression. Further, vital premises of arguments can be scattered over many pages, or missing entirely, and Nozick makes little attempt to summarize or clarify his arguments, or, often, even to show how the separate parts are related. This is partly a consequence of Nozick’s decision to present a ‘philosophical exploration of issues’ rather than a full-scale philosophical treatise. Thus he offers only an outline of his theory, an outline which, in many respects, still remains to be filled in. 15

Finding this description a very appropriate one, I am inclined to think of Thomas Nagel’s remark that, “One is rarely in doubt about what Nozick is claiming, or about what one denies in rejecting his views.” 16 as particularly inappropriate.

§ 6: Of extreme philosophical stances

It is a common feature of Nozick’s and Kant’s that they display an uncompromising willingness to think through, and accept as correct, what follows from various positions, come what may — one could say with Nozick that neither he nor Kant are afraid of drawing “startling conclusions” (x). Sometimes they end up with what most contemporary philosophers in the liberal tradition would call extreme stances. For example, Nozick holds that your having rights of self-ownership (see my Ch. II) yields the view that you are free to sell yourself into slavery or to have somebody else kill you or mistreat you severely according to voluntary contract — cf. statements like, “a free system will allow [an individual] to sell himself into slavery”; “someone may choose (or permit another) to do to himself anything”; “sadism on consenting masochists” (331; 58; 325) — whereas Kant insists in Rechtslehre that it is indeed true a priori that

15 Wolff, Robert Nozick, 2.

the state must kill murderers: “every murderer ... must suffer death; this is what justice, as the Idea of judicial authority, wills in accordance with universal laws that are grounded a priori.” And, “Even if a civil society were to be dissolved by the consent of all its members ... the last murderer remaining in prison would first have to be executed”, he writes. 17 Needless to say, such views are not today considered “politically correct” either.

I confess that as a philosopher (but not, thank God, as a father and husband or in political matters) I am fond of extreme stances. (Which is why I never manage to fall in love with Aristotle.) Extreme points of view are welcome in philosophy because they help us to clear our heads. As Peter Singer generously says of Anarchy, State, and Utopia, “a work of philosophy that consists of rigorous argument and needle-sharp analysis with absolutely none of the unsupported vague waffle that characterizes too many philosophy books must be welcomed whatever we think of its conclusions.” 18 Or as the equally generous — but tough — critic Jonathan Wolff says of it: “Mill’s phrase ‘a one-eyed man’ seems particularly apposite for Nozick.”, but as Mill concedes in Utilitarianism, Wolff continues, “For our own part, we have a large tolerance for one-eyed men, provided their one eye is a penetrating one: if they saw more, they probably would not see so keenly, nor so eagerly pursue one course of inquiry.” 19

To some this might nevertheless sound a bit too negative — though that is by no means Wolff’s intention — so in fairness to Nozick I shall add that when he doesn’t “see more” on certain topics this is not due to his not seeing more but to his not wanting to see more. For he sometimes prefers putting problems before us in a relatively noncomplex form in order to sharpen the issue and to “test” our intuitions about the issue. There is room for that attitude too. If one overlooks this occasional strategy in Nozick it is easy to convict him of being blind to the complexities and difficulties attached to some issues. Bruce Ackerman’s reaction is paradigmatic here. In reference to Nozick’s famous Wilt Chamberlain example (161-163) he claims that, “Our political problem is far more difficult than Nozick imagines ...” 20

I shall myself point to some places in which Nozick avoids discussing the complexities of certain issues and suggest that, and explain why, he should have

17 Kant, Rechtslehre, 334/143; 333/142.
18 Singer, “The Right to be Rich or Poor”, 37.
19 Wolff, Robert Nozick, 142.
20 Ackerman, Social Justice in the Liberal State, 186.
said a bit more on those issues. But it would be wrong to say that he doesn’t realize how difficult these issues are. (Indeed, it happens that one suspects that his realizing the difficulties of an issue to be precisely the reason why he avoids it almost entirely.) Having said that, I do think — and will show — that sometimes his excuse for not dealing more thoroughly with a particular issue simply isn’t good enough.

§ 7: Locke, Kant — and Nozick

It is not unusual, and by no means unnatural, for commentators to emphasize the influence of Locke upon Nozick’s political philosophy; for, as we shall see in subsequent chapters, Nozick’s intellectual debt to him is considerable. One may well say that, “Locke’s influence on Nozick runs deep. It is not absurd to see Nozick’s project as an attempt to rehabilitate what he regards as the rational core of Locke’s political philosophy.”2 To begin with, the rights of man in Nozick are comparable to the rights of man in Locke: “In short, the Nozickian rights are (roughly) the Lockean rights: to be free from force or fraud directed against one’s ‘life, health, liberty, or possessions.’”2 These are what I, in § 19, shall call the first-order rights in Nozick. As we will see in § 21, he also adopts the Lockean second-order rights of enforcement of one’s (first-order) rights.

What is noteworthy, though, is the lack of any Lockean foundation for his preferred set of rights — something Nozick himself makes explicit:

Since considerations both of political philosophy and of explanatory political theory converge upon Locke’s state of nature, we shall begin with that. ... The complete accurate statement of the moral background, including the precise statement of the moral theory and its underlying basis, would require a full-scale presentation and is a task for another time. (A lifetime?) That task is so crucial, the gap left without its accomplishment so yawning, that it is only a minor comfort to note that we here are

1 Wolff, Robert Nozick, 4, “But this is not to say that Nozick takes over Locke entire: there are many important modifications and some major disagreements.”, ibid.

following the respectable tradition of Locke, who does not provide anything remotely resembling a satisfactory explanation of the status and basis of the law of nature in his Second Treatise. (9)\footnote{I am not going to discuss whether this description is totally fair to Locke.}

In a strict, deductive sense, it is true, I think, that Nozick's is what Thomas Nagel calls a "Libertarianism without Foundations". (See Nagel's article bearing that title.) But nothing much is gained by focusing upon the fact that the Nozickian position on rights is not drawn from some clearly formulated foundation (as does Nagel in his largely unsympathetic review), for it is rather obvious that it is not. What is more, one could ask whether there is indeed any view of rights with a solid platform underneath it (many and extensive efforts to ground rights notwithstanding) — a question I address briefly in § 16. However, in a loose sense of the word "foundation" — that is, more in the direction of "support" and "supportive ground" — there is, what Nagel also notes, an intuitionistic foundation of rights in Nozick; one might say that he attempts to show that (only) the Lockean rights are in concord with our firmest intuitions about rights. Nozick, writes Charles Taylor, "seems to feel that he can start from our intuitions that people have certain rights ..." — i.e., the Lockean rights — and that he can "just baldly start" with asserting the primacy of these rights.\footnote{Taylor, "Atomism", 200. Taylor characterizes some theories within the liberal tradition as "primacy-of-rights theories" — among which Nozick's "ultra-liberal" theory is held to be a paradigm case of such theories. I shall say nothing here on Taylor's discussion. (In my "Liberation and Charles Taylor, ante- liberal?", I analyze the argument of "Atomism" in considerable detail and offer some critical remarks on parts of that argument.)} Thomas Scanlon provides an appropriate description of the Nozickian "method" with regard to rights: "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."\footnote{Scanlon, "Nozick on Rights, Liberty, and Property", 108.}

About the missing Lockean foundation, in his introductory book to Nozick, Jonathan Wolff writes:

If there is no Lockean foundation for Nozick's theory of rights, what, then, is its foundation? In Anarchy, State, and Utopia this question, surprisingly, is barely addressed, ... Yet Nozick is not entirely silent. There are various hints that a Kantian inspiration lurks behind his view, and it seems Nozick believes that his theory is Kantian in flavour, if not through and through. In fact, Nozick takes over and adapts just one

Kantian idea, an idea generally referred to as the "Second Formulation of the Categorical Imperative". 'Act in such a way that you always treat humanity...never simply as a means, but always at the same time as an end.' Thus Nozick argues that 'Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means' (30-1). Here, then, is the prospect of an argument to defend Nozick's account of natural rights.\footnote{Wolff, Robert Nozick, 27-28.}

In § 35 I shall argue that the "Kantian inspiration" in Nozick does not, however, concern the foundation of the Nozickian rights. Rather, Nozick's use of Kant's "Formula of Humanity as an End in Itself" (the Second Formula) comes in not at a foundational level but is added as a reason for holding the Lockean rights to be absolute and inviolable.

For purposes of clarification, let me note the following: Throughout this work I prefer (in opposition to Wolff, but with Scanlon) to speak of Nozick's conception of rights rather than of his "theory" of rights. This is so because he doesn't, as will become evident in Ch. II, actually put forward a very systematic opinion on rights; rather, what he has to say on rights is scattered around in different sections of Anarchy, State, and Utopia. (There is not one section or chapter entitled, "My theory of rights; what a right is and which rights there are", or the like.) Hence I find it more appropriate to speak of a "conception" of rights since this expression connects more naturally with expressions like "view", "idea", etc., which aptly capture Nozick's way of philosophizing about rights. I also take my usage to find support in his remark that, "This book does not present a precise theory of the moral basis of individual rights; ..." (xiv) Now since it does not, one can hardly speak of a "theory of rights in Nozick.

A second point in need of clarification at this early stage is this: We should beware of the stark contrast between the importance of Kant to Nozick and the very few times he refers to Kant at all. Apart from Wolff's quotation taken from pages 30-31, Kant is mentioned only at pages 32 (where Nozick quotes Kant's Second Formula and incorporates that formula into his own position); at 39 (where he speaks of "the Kantian moral philosopher"); at 40 (about "utilitarianism for animals, Kantianism for people,")\footnote{Which, admittedly, is also used by Wolff in the quotation above; throughout, however, he speaks of Nozick's "theory" of rights.}; at 47 (on the "Kantian side-constraint view"); at 228 (where he actually invokes Kant against Rawls by claiming that some people "will wonder whether any reconstruction of Kant that...".}
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treats people's abilities and talents as resources for others can be adequate."; and at 338, n1 (where he contrasts Locke's view that, as Nozick puts that view in his main text, "some may abstain and stay in the liberty of the state of nature, even if most choose to enter [civil society] (§ 95)." [54] with Kant's view in the Rechtslehre, § 44, AA 312, that "everyone may use violent means to compel another to enter into a juridical state of society.") In the course of reading Anarchy, State, and Utopia, then, one doesn't get the impression that Kant means much to him; rather, the philosopher whose name one detects every now and then is indeed Locke.

Thirdly, as for the issue of clarification, one will wonder what "the "Kantian" side-constraint view" (47) amounts to. Though that view will occupy me for some time in the next chapter (II), let me, to fix ideas, make some preliminary remarks on it: To depict rights as side constraints upon action is, briefly, to depict rights as constituting (what I would call) an absolute barrier on what people may do to one another (individually or through the state); that in no way, or in no instances, should rights be violated or overridden for some purpose, or for some "higher" cause or the like — rights should not even be violated "in order to lessen their total violation in the society." (29) Yet this view is modified to make room for possible exceptions in extreme situations in which one will have “catastrophic moral horror” (30, fn1) unless one violates some rights; that is, if the total violation of rights in the society will be that total unless one violates some rights. Nonetheless, side constraints upon action are exceptionless within what Nozick calls "a deductive structure" and so allowing exceptions with regard to catastrophic moral horror implies setting aside this whole structure. The complexities of these matters are discussed in § 38 below.

A final preliminary remark on the issue of rights: If one says that on the Nozickian conception one may not violate/override rights, one must add that this view concerns only what I shall call "core" rights; that is, those rights with a stringent rights/non-interference binary structure. (The right not to be killed or raped, say.) These rights are binary for the simple reason that having them entails your absolute duty not to interfere with them; a core right of mine comes "in a pair", as it were, with your non-interference with it. In contradistinction to the binary picture, outside the core there is a further "layer" of rights of mine that you may violate provided you offer me compensation for your violation. As we

10 On exactly why there is no such (positive) right in Nozick, see my discussion of his Lockean set of (negative) rights in Ch. II.
12 Schefter, "Natural Rights, Equality, and the Minimal State", 167, n4. "It is often thought an objection to [Nozick's] entitlement theory that the starving would have no right to food and would have to rely on the charity of others. However Nozick's own position is more complex than this. We must address the question of why these people are starving. ... Nevertheless, the undeserving poor, whose plight is the consequence of their own fecklessness, would have no claim even to the surplus of others.", Woff, Robert Nozick, 111.

13 Under certain conditions, a situation with my starving to death on your lawn will bring into play the Lockean Proviso on Appropriation (cf. 178-182). Nozick writes that, "an owner's property right in the only island in an area does not allow him to order a castaway from a shipwreck off his island as a trespasser, for this would violate the Lockean proviso." (180), but adds that, "the question of the Lockean proviso being violated arises only in the case of catastrophe (or a desert-island situation)." (181) Now, suppose the owner's island is not the only island in the area: may he then order the castaway off his island (who then hopefully will manage to swim ashore somewhere else to find a beseeving owner who won't act similarly?)? Note that Nozick thinks the proviso has the implication of making the "trespasser" no real trespasser but that he doesn't say the castaway is entitled to any help from the owner after having made it to the island; the owner need not supply him with drinking water or food, say, even should his survival depend upon such help being offered. So if I were that starving, thirsty castaway, and your lawn covered the surface of the only island in the area, my crawling onto your lawn to die will be no case of a trespass; i.e., you may not have me removed. Your failing — refusing, even — to actively save my life, though, doesn't seem to run afoul of the Lockean proviso. (But it would seem that you are not justified in actively preventing me from eating from your fruit trees or from drinking from your well
§ 8: The rejection of utilitarianism

The importance of the Kantian side-constraint view (which, as I said, I treat fully in Ch. III) is also seen in Nozick’s stark rejection of any sort of utilitarianism, which doesn’t respect that an individual is “a separate person”:

Individually, we each sometimes choose to undergo some pain or sacrifice for a greater benefit or to avoid a greater harm: we go to the dentist to avoid worse suffering later; ... [etc.] In each case, some cost is borne for the sake of the greater overall good. Why not, similarly, hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no social entity with a good that undergrees some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the other. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. He does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him — least of all a state or government that claims his allegiance (as other individuals do not) and that therefore scrupulously must be neutral between its citizens (32-33).14

Observe that the term ‘utilitarianism’ is not actually employed in this connection. But the argument is clearly tailored, I think, so as to constitute an attack on utilitarian thinking and acting in general.

Perhaps Nozick’s construal of utilitarianism, where he has such a construal, is too simple and overlooks many sophisticated versions of it — cf. the contrast if I manage to do so; for these will be the only resources there are in this situation, parallel to your island being the only island there is in the area.)

14 To the expression “a separate person” is attached a note in which Nozick refers to Rawls’ A Theory of Justice, Sects. 5, 6, and 30. (337, n5) In Sect. 5, “Classical Utilitarianism”, Rawls claims that, “Utilitarianism does not take seriously the distinction between persons.”, 27. We may say that Nozick’s expression “a separate person” reflects an anti-utilitarian attitude paralleling the attitude signaled by Rawls’ expression “the distinction between persons”. Besides, Nozick’s argument bears a striking resemblance to Rawls’ argument: “We may impose a sacrifice on ourselves now for the sake of a greater advantage later... Now why should not a society act on precisely the same principle applied to the group and therefore regard that which is rational for one man as right for an association of men?”, ibid., 23. It is not difficult to see how neatly this parallels the “dentist” example in Nozick. That parallel notwithstanding, Nozick claims that Rawls’ Difference Principle (2nd Principle) in fact violates the distinction between persons since it, on Nozick’s interpretation, legitimizes using particular persons as resources (means) to promote the welfare of the members of the worst off group in society; so Rawls falls by his own standards. (On this point, see 213-216; the section entitled ‘Natural Assets and Arbritrariiness’.) The way Nozick sees it, then, the “Kantian” Rawls is far from Kantian enough — of which I shall say no more.

§ 9: The dignity of the individual

Furthermore, as for what’s Kantian in Nozick, the libertarian theory, in its very last passage, culminates in a Kantian voice indeed:

The minimal state treats us as inalienate individuals, who may not be used in certain ways by others as means or tools or instruments or resources; it treats us as persons having individual rights with the dignity this constitutes. Treating us with respect by respecting our rights, it allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary cooperation of other individuals possessing the same dignity. How dare any state or group of individuals do more. Or less. (333-334)

Compare this statement, together with the anti-utilitarian attitude displayed at pages 32-33, to remarks made by John Ladd in the introduction to his translation of Metaphysische Anfangsgründe der Rechtselehre:

The key to Kant’s moral and political philosophy is his conception of the dignity of the individual. This dignity is the source of his innate right to freedom, and from the right to freedom follow all his other rights, specifically his legal and political rights. Inasmuch as every individual possesses this dignity and right, all men are equal. Thus, Kant may be regarded as the philosophical defender par excellence of the rights of man, of his equality, ... In emphasizing the rights of the individual, Kant sets himself against every form of utilitarianism... Insofar as any course of action, private or public, conflicts with these rights, it is ipso facto wrong; and it is wrong regardless of the amount of good that may result from it. In this sense, he categorically repudiates the principle that the end justifies the means, however good and worthwhile the end may be.15

We may take what Nozick says in the last passage of his treatise (at pages 333-334) to mean that the state should not dare not to respect individuals as ends in themselves.

§ 10: A distinction between morality and legality

The emphasis on state neutrality (at 33) may also be seen in relation to the

15 Ladd, “Translator’s Introduction” to Kant, The Metaphysical Elements of Justice, ix.
fact that Nozick’s position places itself beyond the question of what it is morally right and what it is morally wrong for an individual to do, or fail to do, with his life and beyond the question of what sort of person he ought to be; beyond, if you like, what Bernard Williams names Socrates’ Question: “How should one live?” One may say, then, that the position is silent on matters that belong to the outermost “circle” surrounding your rights; that is, beyond (noncompensable) core rights and other (compensable) rights.

From the perspective of any moral philosophy I can think of it will, to reuse an example, be morally wrong to just let someone die on one’s lawn while doing nothing to try to save him. But since he, the way Nozick sees it, has no right that you act to that effect, whether your refraining from acting is morally wrong or not is no issue for political philosophy; nor is the issue of what it means to “use” another outside the context of his rights: “In getting pleasure from seeing an attractive person go by, does one use the other solely as a means? Does someone so use an object of sexual fantasies? These and related questions raise very interesting issues for moral philosophy; but not, I think, for political philosophy. Political philosophy is concerned only with certain ways that persons may not use others; primarily, physically aggressing against them.” (32) That a man in his fantasies conceives of himself as (what feminists would call) a “male chauvinist pig”, then, is irrelevant to political philosophy — but his raping his “object” is relevant indeed; such an act constitutes a violation of another’s core rights of non-interference. Thus, “Rights are not simply the other side of responsiveness, whereby we always would have a right to be treated as others ought to treat us. For this encompasses too much; although others ought to treat us in a certain way in virtue of our basic moral characteristics, not every such treatment is something we have a right to, or a right to demand, or a right to have enforced.”

However, none of this means that political philosophy may be seen as completely “detached”, as it were, from moral philosophy. On the contrary, “Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.” (6) Although the libertarian treatise “does not present a precise theory of the moral basis of individual rights” (xiv), it is clear that respect for these rights, on

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16 See Williams, Ethics and the Limits of Philosophy, ch. 1.
17 Nozick, Philosophical Explanations, 498-499. The idea of (moral) responsiveness is given in ibid., 462-473.
18 For more on Locke’s law of nature, see Ch. II, especially footnote 32, below.
19 On the establishment of the minimal state (on how it grows out of the state of nature), see § 70 below.
20 Nozick, Philosophical Explanations, 503; italics mine.
21 Riley, Will and Political Legitimacy, 131; 127.
22 Kersting, “Politics, Freedom, and Order: Kant’s Political Philosophy”, 347.
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that, "One must not lose sight of the full scope of [Kant's] view, one must take the later works into consideration. Unfortunately, there is no commentary on Kant's moral theory as a whole; perhaps it would prove impossible to write." 23

Robert B. Pippin notes that,

the chief reason commentators have concentrated so heavily on the logical problems of universalizability and moral judgment has not been willful neglect of the rest of Kant's moral theory, but because it has never been clear how to put all the parts together. It is at least clear what problems must be faced in Kant's formulation of the categorical imperative, but it is far from clear how one is to understand the relation between Kant's foundational theory of morality and his philosophy of history, of religion, of law, of politics, of virtue, of education, of beauty, and of teleology, all of which are explicitly said to be parts, in sometimes various senses, of the practical or moral theory. 24

In this work I shall not confront the question of how to relate all those parts in Kant. (Though I shall, in §§ 80 and 81, discuss the problematic relation between the Categorical Imperative and Kant's view of sovereignty and of revolution.) This issue is so big that it would require a full-scale presentation. Besides, that issue cannot, I believe, be confronted properly without going "below" Kant's foundational theory of morality, namely, to his theoretical philosophy. For even in _Kritik der reinen Vernunft_ there are comments on political matters; for example, it is held that, "A constitution allowing the greatest possible human freedom in accordance with laws by which the freedom of each is made to be consistent with that of all others — I do not speak of the greatest happiness, for this will follow of itself — is at any rate a necessary idea, which must be taken as fundamental not only in first projecting a constitution but in all its laws." 25

Furthermore, apart from particular comments, at a general level, the Kant scholar Onora O'Neill notes, perhaps "it is no accident that the guiding metaphors of the _Critique of Pure Reason_ are political metaphors." 26

The close connections between the short political essays and the central critical writings suggest not only that the essays are part of Kant's systematic philosophy, and not marginal or occasional pieces, but also perhaps that the entire critical enterprise has a certain political character. If the discussion of reason itself is to proceed in terms of conflicts whose battlefields and strife are scenes of defeat and victory that will give way to a lasting peace only when we have established through legislation such courts;

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23 Rawls, A _Theory of Justice_, 251, fn29; italics mine.
25 Kant, _Kritik der reinen Vernunft_, A 316, B 375/312.
27 Kant, _Regardlesse_, 381/187. Now if I am coerced into doing X, I can hardly do X without X being my end in the _lateral_ sense. Otherwise, how could I do X at all; how could I do X without its being the end towards which I directed my action? The question then is: is X thereby my end too so that it has indeed been made my end? Since Kant thinks this is impossible, he must believe in the possibility of an "internal split" in a person's mind: that he can have X as an end, yet (or simultaneously) not have it as his "real" end — as if the person could say to himself: "I now make X my end; my mind is set on doing it. Otherwise I couldn't do X. But my conviction lies elsewhere; that is, I am not convinced of the correctness in doing X." I am not sure of this point, or of whether I put the issue very clearly here.
28 Kant, _Rechtslehre_, 239/64.
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and from duty, i.e., from respect for the law. The former, legality [Legalität], is possible even if inclinations alone are the determining grounds of the will [des Willens], but the latter, morality [Moralität] or moral worth, can be conceded only where the action occurs from duty, i.e., merely for the sake of the law.”

Hence, “The mere conformity or nonconformity of an action with law, irrespective of the incentive to it, is called its legality (lawfulness) [Legalität (Gesetzmäßigkeit)]; but that conformity in which the Idea of duty arising from the law is also the incentive to action is called its morality [Moralität (Sittlichkeit)].”

Now if we look to morality in the wider sense, Kant says:

In ancient times "ethics" signified the doctrine of morals [Sittenlehre] (philosophia moralis) in general, which was also called the doctrine of duties ... the system of the doctrine of duties in general is however now divided into the system of the doctrine of Right [Rechtslehre] (ius), which deals with duties that can be given by external laws, and the system of the doctrine of virtue [Tugendlehre] (ethica), which treats of duties that cannot be so given; and this division may stand.

In the wider — or general — sense, then, morality concerns itself with all doctrines of duty and may thus stand as the "heading" of both ethical and juridical laws. Accordingly, morality in the narrow sense has to do with Tugendlehre. Within this "area" the only constraints there are, we said, are those people force upon themselves since actions are here done because of — from the motive of — duty solely: "self-constraint [Selbstzwang] in accordance with (moral) laws belongs to the concept of ethics alone." Rechtslehre, by contrast, deals "only with the formal condition of outer freedom (the consistency of outer freedom with itself if its maxim were made universal law), that is, with Right [Recht]." Thus the universal principle of right — § 3 C Allgemeines Prinzip des Rechts: "Any action is right [recht] if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice [Willkür] of each can coexist with everyone’s freedom in accordance with a universal law.” And elsewhere: “Right [Recht] is the restriction of each individual’s freedom so that it harmonises with the freedom of everyone else (in so far as this is possible within the terms of a general law).”

As far as the universal principle of right is concerned, one could say that, “In the domain of law it does not matter why I do what I do, so long as I abstain from violating the rights of others. Because the motive does not matter in legal affairs, if I do not perform as I ought, I can rightly be compelled to do so. I obtain no moral merit for carrying out legal duties. I simply keep my slate clean.”

Howard Williams notes that in Kant’s formulation of the universal principle of right, “there is little indication of direct ethical obligation. But this formulation is clearly very closely connected with the categorical imperative ... however, the principle of right has a different status. ... [it] need not ... determine my motives in acting. I can act simply out of self-interest if I wish (something which cannot

29 Kant, Kritik der praktischen Vernunft, 81/84-85.

30 Kant, Rechtslehre, 219/46. Cp. ibid., 225/51: “The conformity of an action with the law of duty is its legality (Gesetzmäßigkeit) (legalitas); the conformity of the maxim of an action with a law is the morality (Sittlichkeit) (moralanus) of the action.”

31 Kant, Tugendlehre, 379/185. Cp. Rechtslehre, 239/64: “All duties are either duties of Right [Rechtspflichten] (officia iura), that is, duties for which external lawgiving is possible, or duties of virtue [Tugendpflichten] (officia virtutis s. ethica), for which external lawgiving is not possible.”

32 Kant, Tugendlehre, 381/187.

33 Ibid., 380/186.

34 Kant, Über den Gemeinspruch, 289-290/73. We may note a major problem as regards translation here. Kant’s universal principle (Princip) of right, as stated in Rechtslehre, AA 230, goes like this in German: “Eine jede Handlung ist recht, die eider nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann.” Mary Gregor observes that, “The most serious problems of translation occur within the Doctrine of Rights. There is unfortunately no common English word that would translate Recht.”: “Translator’s Note on the Text” of The Metaphysics of Morals, x. Furthermore, commentators disagree on which translation is best (worse). For instance, Paul Guyer writes: “Kant’s noun Recht is a perennial problem for translators. The term, Kant’s German equivalent for the Latin ius, does not connote the moral or legal claim of a particular person or group of persons to a particular benefit or cluster of benefits, as does the corresponding English noun ‘right’ (which, unlike Recht, can naturally be used in the plural); rather, like a mass term, it connotes a total situation of external lawfulness (as contrasted to inner morality). For this reason, it is often translated as ‘justice’; but that can be misleading too, given the compensatory or punitive connotation of many contemporary usages of that English term. For these reasons, I prefer to follow the precedent of Hegel translators and translate Recht by the singular noun ‘right’; the occasional awkwardness of this translation can serve to remind the reader that Kant’s concept of right does not straightforwardly correspond to any single concept in traditional British political philosophy.”:

35 Kapteyn, The Cambridge Companion to Kant, 364-365, n1. Leslie A. Madhroid believes that, “‘Recht’ ... is best translated as ‘rights,’ or when referring to the system of rights, as ‘law’ (without any article), although this expression is ambiguous in English. Kant also uses other terms which are compounds involving ‘recht.’ ‘Rechtspflicht’ shall be translated as ‘duty’ which a right corresponds.”: “Kant’s System of Rights,” 10. Thomas Pogge, however, argues that as for Kant’s conception of a juridical or law-governed state, which Kant calls “rechlichkeit” or “gesetzmacht.” Translations as "rightful", “lawful”, or “legal” are misleading, because a juridical state may well be unjust (in reference to natural law); and, as constitutive of legality, cannot itself be legal, or lawful, in reference to positive law. (Cf. how “rechtlich” contrasts with “rechtsmachtig” at Perpetual Peace 373n/118n.): “Kant’s Theory of Justice”, 415, fn14.

be tolerated at all under the categorical imperative).”

§ 13: Kant’s conception of Naturrecht and concept of a natural right

Though all of this may sound quite straightforward, there is much more than meets the eye here. For once we plunge into the philosophical technicalities of the doctrine of right, we dive into a world very much of its own: “A reader who turns to the Rechtslehre from current legal philosophy enters a foreign and exotic land. Although the main signposts — contract, property, punishment, and so on — seem to be familiar, the landscape in which they are situated is a dense thicket of conceptualisms, a swirling mass of terminological obscurities that map out a section of something called the metaphysics of morals.” Among other things, in this “exotic land” there is a special conception of Naturrecht, which can be seen the following way.

In the Introduction to the doctrine of right, the full content of the first section — § A Was die Rechtslehre sein? — is this:

The sum of those laws for which an external lawgiving is possible is called the Doctrine of Right (ius). If there has actually been such lawgiving, it is the doctrine of positive Right [positiven Rechts], and one versed in this, a jurist (jurisconsultus), is said to be experienced in the law (jurisperitus) when he not only knows external laws but also knows them externally, that is, in their application to cases that come up in experience. Such knowledge can also be called legal expertise (jurisprudentia), but without both together it remains mere juridical science [Rechtswissenschaft] (juriscientia). The last title belongs to systematic knowledge of the doctrine of natural Right [natürlichen Rechtslehre] (ius naturae), although one versed in this must supply the immutable principles for any giving of positive law.

37 Williams, Kant’s Political Philosophy, 67-68. As for the (“very close”) connection Williams speaks of here, I would say that both the categorical imperative and the principle of right address the question of universality by way of a “thought experiment”. Having said that, we may also observe the following: “What is striking about [Kant’s] later account is the small role played in it by the categorical imperative: it is reverently mentioned a few times, but not used in the argument for particular duties as, clearly, the Groundwork had anticipated that it would be. Instead, Kant starts out with a fundamental divide within the metaphysic of morals — postulating two spheres of morality, each with its own highest principle.”. Pogge, “Kant’s Theory of Justice”, 410.

38 Weinrib, “Law as Idea of Reason”, 16. Worse still, Kant builds up the Rechtslehre in a rather untidy way; it has been argued that several sections should trade places. It is not difficult, then, to agree with Otfried Höffe that it is “einen sorgten Text, der die analytische Gedankenarbeit der Leser heranforderst.”; Immanuel Kant, 209.

39 Kant, Rechtslehre, 229/55. In the next section — § B Was ist Recht? — it is said: “Like the much-cited query “what is truth?” put to the logician, the question “what is Right?” might well embarrass the jurist if he does not want to lapse into a tautology ... he can indeed state what is laid down as right [was Rechens es] (quam sit rei), that is, what the laws in a certain place and at a certain time say or have said. But whether what these laws prescribe is also right [auch recht sei] ... would remain hidden from him unless he leaves those empirical principles behind for a while and seeks the sources of such judgments in reason alone [die Quellen jener Urteile in der bloßen Vernunft sucht], ... Like the wooden head in Phaedrus’ fable, a merely empirical doctrine of Right is a head that may be beautiful but unfortunately it has no brain.”; ibid., 229-230/55. To Kant, then, “the concept of a legal system includes the concept of morality. For there can be legal obligation only if there can be moral obligation.”; Mullock, Kant’s System of Rights. 22. Also, “A legal system that assumes no reference to morality cannot present these subject to it as responsible beings.”; ibid.; italics mine.

40 Kant, Rechtslehre, 224/50-51.

41 ibid., 237/65.

42 ibid. The contrast here is with “an acquired [erworben] right ... for which such an act is required.”.; ibid.

43 ibid.

44 Kant, Über den Gemeinspruch, 291/74.
wishes to, ..." As we shall see in § 69, this Kantian position flies in the face of Nozick’s position according to which there is no such thing as an inalienable right.

§ 14: Morality, legality, and humanity as an end in himself

What, it will be asked, is the point in drawing attention to the rather incongruent distinctions between morality and legality in Nozick and in Kant? Now, though the substance of Nozick’s duties of justice is different from that of Kant’s, for example, their distinctions do nevertheless coincide. That is to say, they draw the same distinctions — even though they put different things into their “boxes”. Furthermore, in both philosophers the distinction between morality and legality plays an immense role. Its main role in both, I would like to claim, is to help secure that the individual is treated as an end in himself, or, alternatively, to help protect him from not being treated so. (On the difficult notion of treating someone as an end — in contradistinction to the relatively clear notion of treating him as a mere means — see § 35 below.) More precisely in this connection: securing and protecting his autonomy. My argument is as follows.

In Kant we can bring this out by focusing upon one crucial element of the principle of right (at AA 230), an element that is easier to get a grasp of if one looks to the original text: In German, the expression “the freedom of choice” is “die Freiheit der Willkür”, and refers to the arbitrary freedom — in contradistinction to the freedom of the rational will (Wille) which accords with the demands of the categorical imperative — that man must be allowed to exercise provided he doesn’t impinge upon the (equal) freedom of others. Hence, “With Kant the idea of right is supposed to allow the individual the use of his arbitrary freedom.”46 Now why is the use of that freedom so important? “Because we are autonomous”, writes J. B. Schneewind, Kant thinks that “each of us must be allowed a social space within which we may freely determine our own action.”47 (On Kant’s conception of autonomy, see § 60 below.) Accordingly, if we were not allowed to do so, our autonomy would be undermined. And undermining an individual’s autonomy is not, of course, compatible with treating him as an end in himself.

Furthermore, Kant warns against mixing up the sphere of morality with the

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45 Ibid., 392/75; 304/84.
46 Williams, Kant’s Political Philosophy, 73.

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sphere of legality in the sense not keeping strictly moral issues apart from strictly legal issues. On this, Nils Gilje writes:

One may ... be forced into doing what one has a legal duty to do. Moral duties, on the other hand, may not legitimately be enforced. For instance, Kant places the moral prohibition on suicide within this category. So also with the moral obligation that man shall develop his natural assets ("perfecting" himself). These are not legal issues. The state may not legitimately punish an individual for trying to commit suicide or for failing to exercise. Accordingly, Kant is against illicitly making moral themes into legal themes. Excessive use of intoxicating drugs is morally objectionable, but not subject to legal persecution. But Kant almost certainly would have supported laws banning cigarette smoking in public places (this being a threat to other people’s life and health).48

Thus, "The law may not impose duties of virtue. And it must be indifferent to the citizens’ inner attitudes, must impose duties of justice, but not their indirect-ethical counterparts — as Kant puts it: the sovereign must require only the legality, not the morality, of actions."49 As for the distinction legality of actions/morality of actions, we may note the following parallel examples in Kant and Nozick.

Nozick says on the development of natural assets that, “people are free to stagnate if they wish ...” (329, fn) Kant thinks that as a rational being man “necessarily wills that all his faculties should be developed, ...”, and that therefore morality requires that he ought not “[like South Sea Islanders] ... let his talents rust ..."50 However, from the point of view of legality, we observed, an individual may not legitimately be punished for letting his talents rust. As for suicide: Taking one’s life from the maxim of self-love is “wholly opposed to the supreme principle of all duty.”51, and violates a perfect duty to oneself:

Willfully killing [willkürliche Entleibung] oneself can be called murdering oneself [Selbstmord] (homocidium dolosum) only if it can be proved that it is in general a crime committed either against one’s own person or also, through one’s killing oneself; against another (as when a pregnant woman takes her life). ... To annihilate the subject of morality in one’s own person [Das Subjekt der Sittlichkeit in seiner eigenen Person zerrichten] is to root out the existence of morality itself from the world, as far as one can, even though morality is an end in itself. Consequently, disposing of oneself as a

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48 Gilje, "Das naturrechtliche Kontaktparadigma", 304-305.
49 Pegge, “Kant’s Theory of Justice”, 421; italics mine.
50 Kant, Grundlegung, 423/31.
51 Ibid., 422/31.

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mere means [bloßes Mittel] to some discretionary end is debasing humanity in one’s person [die Menschheit in seiner Person abwürdigen] ...52

But a state ought not to do anything to prevent such individual “debasing”. Furthermore, the state is in no position to “invade” the inner lives of citizens and so must be indifferent to their inner attitudes — that is (we noted above), it is impossible on the Kantian account to impose duties of virtue upon someone: “Ethical lawgiving (even if the duties might be external) is that which cannot be external; juridical lawgiving is that which can also be external.”53 (Would so-called “brainwashing” [of which Kant of course had no knowledge], if effective, constitute an exception; brainwashing being a way of externally, i.e., through the imposition of a brainwashing programme, making someone have the right ethical attitude? What if one could so “wash” everyone’s brain that they always acted upon the Categorical Imperative? However, this would make all juridical, external lawgiving unnecessary.)

As long as Nozick holds that “someone may choose ... to do to himself anything”, he would respond to a person preparing for suicide: “Go ahead!”, “unless [you have] acquired an obligation ... not to do ... it.” (58) — that is, a legal obligation according to contract, enforceable by the (minimal) state (which is “limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, ...” [ix]54) Suppose you obligate yourself to provide for a particular disabled person for n years. Then you may be forced (by the police) into fulfilling your self-imposed obligations to this person in case you won’t stand by those obligations during that period. (Perhaps the state will force you to pay by taxing you.) On the other hand, concerning this matter, if no contract were signed but you just said you would provide this or that, the only sort of obligation you might find yourself under is a moral obligation (a moral duty). No doubt Kant shares this view as regards what sorts of obligations may be enforced by the state: A person who is “merely communicating his thoughts to” others, “telling or promising them something, whether what he says is true and sincere or untrue and insincere (veritium aus falsitium); [then] it is entirely up to them whether they want to believe him or not.”55 And, he adds in a footnote attached to this last sentence, “The only kind of untruth we want to call a lie, in the sense bearing upon rights, is one that directly infringes upon another’s rights, e.g., the false allegation that a contract has been concluded with someone, made in order to deprive him of what is his (falsis obviam dolosum). ... when someone merely says what he thinks, another always remains free to take it as he pleases.”56 So duties of justice”, notes Pogge, “do not match the Groundwork’s perfect duties towards others: Lies and deceitful promises are paradigmatic violations of perfect duties towards others (as well as towards oneself), yet they do not violate duties of justice (Rechtslehre 238&n).”57 On the other hand, “faithful performance (in keeping with promises made in a contract) is no duty of virtue ... but a duty of Right (Rechtspflicht), to the performance of which one can be coerced” by the state.58 (Nonetheless, “it is still a virtuous action (a proof of virtue) [Beweis der Tugend] to do it even where no coercion may be applied.”59 So your providing for the disabled person in a situation where the state may not coerce you to provide for him — no contract stating that you will, say — will constitute such a proof.)

Another parallel as regards morality and legality in Nozick and Kant: On the basis of his joint conceptions of “prohibition, compensation, and risk” (Chapter 4), Nozick argues against the legitimacy of industrial pollution of the air that we all breathe (79-81), and accordingly would presumably support a ban on smoking

52 Kant, Jüngere Schriften, 422-423/218-219. (This quotation is taken from Article I of Book I: Perfect Duties to Oneself) Kant goes on, while apparently not being sure of what the answer might be, to consider some casuistical questions: “Is it murdering oneself to hurl oneself to certain death (like Curtius) in order to save one’s country? Or is deliberate martyrdom, ...?, or “Can a great king who died recently [i.e., Frederick the Great] be charged with a criminal intention for carrying a fast-acting poison with him,” — what we today would call a suicide pill — “presumably so that if he were captured when he led his troops into battle he could not be coerced to agree to conditions of ransom harmful to his state?” ibid., 423/219-220. (May we conjecture from Kant’s remarks in AA 422 about the pregnant woman taking her life that he would be opposed to abortion at any stage of pregnancy and so be totally against it? If so, presumably Kant would be against abortion not only on moral grounds but on legal grounds as well: If the human fetus at any stage after conception must be attributed the same moral worth as born human, then it would seem to follow that abortion is not only morally wrong but also legally wrong because it violates the universal principle of right in destroying, literally, another’s freedom; i.e., the action — that is, abortion — cannot “coexist with everyone’s freedom in accordance with a universal law”; AA 230.)

53 Kant, Rechtslehre, 220/47. “Kant sometimes seems to claim that duties of virtue can not be commanded or enforced. While this seems true of indirect-ethical duties, one may well doubt whether it is true in general. There is nothing impossible, it seems, about preventing the utterance of a lie, or in requiring citizens to show, annually say, that they had done something in the way of promoting their talents or helping the needy.” Pogge, “Kant’s Theory of Justice”, 411, fn.9.

54 On the limited functions of the minimal state, see § 74 below.

55 Kant, Rechtslehre, 238/63.

56 ibid., 238, fn/63-64, fn.

57 Pogge, “Kant’s Theory of Justice”, 410, fn8.

58 Kant, Rechtslehre, 220/47; italics mine.

59 ibid.
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in public places — as would, presumably, Kant; cf. the quotation from Gilje above on “Kant and cigarette smoking.” On the very same basis, Nozick would however hold that excessive drinking or drug abuse may legitimately be prohibited when it causes behaviour which threatens or violates the rights of other people; therefore one must drink or “get high” in ways and places that pose no threat to others. Hence, if it is known that you become dangerous to other people after drinking half a bottle of whisky you may be ordered off public places after having consumed that amount of whisky. (Cf. also my example with the junkie walking around with a knife in § 46 below.) There is, in other words, ground for preventive restraint or detention in this case:

Included under [the widened notion “preventive restraint”] would be requiring some individuals to report to an official once a week (as if they were on parole), forbidding some individuals from being in certain places at certain hours, gun control laws, and so on (but not laws forbidding the publication of bank alarm systems). Preventive detention would encompass imprisoning someone, not for any crime he has committed, but because it is predicted of him that the probability is significantly higher than normal that he will commit a crime. (His previous crimes may be part of the data on the basis of which the predictions are made.)

Although Kant has no conception of preventive restraint, he would say, I conjecture, that one is justified in imposing such restrictions on people because their action can no longer coexist with everyone’s freedom in accordance with a universal law. But this is merely another way of formulating a distinction between morality and legality: the justification for state action in this case is to be found within the legal realm, not within the realm of morality.

§ 15: The philosophy of laissez-faire economics and the role of morality

One may say that a morality-legality distinction is detectable in Kant and Nozick in economic matters. To arrive at that point of view I’ll start off with something of a detour.

60 In *Philosophical Explanations* Nozick remarks on the issue of smoking in public places: With regard to the question of “passing diffuse cigarette smoke to others,” this problem can partly be solved by reference to the right to hold private property, since “the owner who decides upon the rules to govern the emissions of smoke on his property thereby (to a great extent) internalizes the externality. However, this leaves an issue for property owned by governments, and it leaves groups jointly exercising property rights with the question of which rules are proper.”, 739, n93.

61 Members of the American Rifle Association and their lobbyists, who frequently protest against gun control laws as violations of individual liberty and of “the constitutional right to carry arms”, should notice this *libertarian* argument in favour of such laws.

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To begin with, we may note a fundamental difference between the two philosophers in their views on how property comes to be owned:

Kant … connects the authorization of appropriation with the obligation to subject the right of property thereby created to juridical confirmation through the institutionalization legislation of all. To be sure the *prima occupatio* is legitimate, but in contrast to Locke’s property grounded in labor, the possession that begins with it is juridically incomplete. This argument rests on the systemically important insight that no empirical act, … can constitute a right … Locke’s conception of property as grounded in labor founders on this insight; … Nozick’s entitlement theory of justice also cannot be maintained against Kant’s theory of property.

Having noted that difference, we should also note that both Kant and Nozick are staunch *laissez-faire* supporters. (They support what David Gauthier calls a “moral anarchy.”) Compare, for example, Nozick’s slogan, “From each as they choose, to each as they are chosen.” (160) With this statement of Kant’s: “Acquisition through another’s deed to which I determine him in accordance with principles of Right [Rechtsgesetzet] is … always derived from what is his; and this derivation … cannot take place through a negative act of the other, namely his abandoning or renouncing what is his (…); for by such an act … nothing would be acquired.” The fact that they hold different views on how property rights originate can then be seen separately from their views on the *operating consequences* of a free market. We have already seen the anti-welfarist nature of Nozick’s view. And Kant holds that, “uniform equality of human beings as subjects of a state is … perfectly consistent with the utmost inequality of the mass in the degree of its possessions, …” For example, a subject “may hand down everything … material … for it may be acquired and disposed of as property and
may over a series of generations create considerable inequalities in wealth among the members of a commonwealth.\textsuperscript{67}

Also, Kant emphasizes that people’s opinions differ a lot as to what in life may bring them “happiness” and “welfare”, and so a government that acts towards its citizens upon a particular conception of happiness and welfare will in fact be paternalistic — an imperium paternale, which is “the greatest conceivable despotism.”\textsuperscript{68} Therefore, “No generally valid principle of legislation can be based

\textsuperscript{67} Kant, Über den Gemeinspruch, 293/76. Pippin writes that Kant “just does not consider the issue raised so often in the nineteenth century, whether this inequality alone just as effectively ‘prevents’ equal opportunity of advancement as inherited authority. That is, he does not consider whether his own argument about hereditary privilege should lead him to deny an unrestricted right to bequeath property.” “On the Moral Foundations of Kant’s Rechtslehre,” 141. It may be noted that Nozick has later proposed a modification of the position entailed by the libertarian slogan (at 160). Thus he writes: “bequests that are received sometimes ... are passed on for generations to persons unknown to the original earner and donor, producing continuing inequalities of wealth and position.” The resulting inequalities seem unfair. One possible solution would be to restructure an institution of inheritance so that taxes will subtract from the possessions people can bequeath the value of what they themselves have received through bequests. People then could leave to others the amount they themselves have added to (the amount of) their own inheritance.” “Parents and Children”, 30. Therefore, “If property is a bundle of rights to something (to consume, alter, transfer, spend, and bequeath it) then in bequest not all of these rights get transferred, and in particular the right to bequeath that item does not — this adheres to the original earner or creator.” ibid., 11-32.

\textsuperscript{68} “No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law — i.e. he must accord to others the same right as he enjoys himself. A government might be established on the principle of benevolence towards the people, like that of a father towards his children. Under such a paternal government [väterliche Regierung] (imperium paternale), the subjects, as immature children [als unmündige Kinder] who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgement of the head of state as to how they ought to be happy, and upon his kindness in willing their happiness at all. Such a government is the greatest conceivable despotism, i.e. a constitution which suspends the entire freedom of its subjects, who thenceforth have no rights whatsoever”. Über den Gemeinspruch, 290-291/74. (We saw in § 13 that the right to freedom is the only inalien [natural] right.) In Rechtslehre Kant contrasts a paternal government with a “patrician” one. By the latter, he says, “is understood not a paternalistic [Väterliche] one (regimen patronale), which is the most despotic of all (since it treats citizens [Bürger] as children): …”, 317/128. One may say that a paternal government uses the citizen as a means and hence violates the Second Formula: “[In Kant] we can show that politics is concerned with the regulating of freedom according to principles. But we can also show that it ought not to be concerned with anything else. If our goal is to respect the freedom of origins of others, then the only ground on which we can restrict the freedom of one such agent in our attempt at reconciliation is to harmonize it with the freedom of others. Happiness cannot be a justification of such restrictions. No one else’s happiness can be, because to override his own goals in the name of those of someone else would be to use him as a means. And his own happiness cannot be, because to restrict him for his own utility would be to determine for him in what his happiness consists. This would be unacceptable paternalism, one that would constitute a rejection of his status as a free rational agent.”, Taylor, “Kant’s Theory of Freedom”, 114-115; italics mine. I treat the issue of paternalism extensively in Ch. III.

Yet things are not quite straightforward in Kant here. Living in the 18th Century, he of course couldn’t have had any conception of a welfare state in our sense of the word. Nor could he foresee the emergence of the capitalist economic system, nor the gross material inequalities it tends to produce. Therefore, an instance of “the utmost inequality” in possessions today presumably would involve a degree of inequality that Kant wasn’t able to imagine taking place within a juridical state. Furthermore, his critique is directed at the authoritarian “welfare state” of his time.

Nonetheless, we can still ask whether the kind of state Kant envisages\textsuperscript{70} may be, in principle, compatible with some sort of a modern welfare state:

Although Kant clearly held the citizens’ happiness to be irrelevant as a legislative consideration (e.g. Theory and Practice 298/80), justice — through the principle of enlightenment — would ... nevertheless require that the sovereign shape social and economic institutions with an eye to minimizing illiteracy, poverty, and severe inequality in rights and possessions, wherever these tend to keep people dull and dependent. [The characteristic features of the so-called modern welfare state could then be justified within Kant’s theory only insofar as they are deemed (a) necessary, pursuant to the principle of consistency, for the stability of the state itself (Theory and Practice 298/80), or (b) supportive of the enlightenment of the populace as demanded by the principle of enlightenment.] Perhaps Kant believed that there would be little leeway left for choice in these matters, since the principle of universality and the principle of enlightenment jointly entail — even prior to the existence of a civil constitution — economic arrangements of a (roughly) libertarian sort that would rule out redistributive taxation.\textsuperscript{71}

Kersting holds that, “Kant’s philosophy of right is thoroughly compatible with the concept of a social state in the service of freedom.”\textsuperscript{72} In another work he claims that, “Like the other philosophical guiding stars of our Western political culture, Kant had no genuinely philosophical interest in clarifying and grounding the concepts of social equality and economic justice. This limitedness of his

\textsuperscript{69} Kant, Über den Gemeinspruch, 298/80.

\textsuperscript{70} On this state, see § 83 below.

\textsuperscript{71} Pogge, “Kant’s Theory of Justice”, 421-422 and 422, fn 40, italics mine. The principles of consistency, universality and enlightenment are defined in ibid., 414: “(FP-1) Consistency: rational persons ought to coexist under a system of constraints ensuring mutually consistent domains of external freedom; (FP-2) Universality: that system ought to limit everyone’s external freedom equally — the constraint should be general and universal; (MP) Enlightenment: the system of constraints ought optimally to promote the development and flourishing of reason.”

\textsuperscript{72} Kersting, "Politics, Freedom, and Order: Kant’s Political Philosophy", 357; italics mine.
political philosophy should not be interpreted away." Yet,

I do not want to claim that there is no possibility of sketching a welfare state justification which is compatible with Kant's political philosophy: if social tensions, class conflicts and economic inequality threaten to undermine the firmness of the legal order and destabilize the rule of law then it is necessary, if only for public justice's own sake, to launch appropriate welfare state programmes. ... It is not possible to derive logically principles of the welfare state from the basic concepts of the entirely legally formulated Kantian idea of justice, from the conceptions of liberty and equality. Logical and conceptual justification arguments and instrumental and empirical justification arguments should not be confused. 74

I shall leave it to Kant scholars to elaborate on these matters. However, as it stands, Kant's political philosophy seems pretty much laissez-faire. Congruent with that observation is Kant's view that the state may not force you to help human beings in destitution: "The concept of Right [der Begriff des Rechts], insofar as it is related to an obligation corresponding to it ... does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence [Wohltätigkeit] ..." 75 Legally speaking, therefore, there is no duty to help out. But, again, what Kant here thinks is no legal duty he nevertheless holds to be a moral duty: Even though a person has "no desire to contribute anything to [another's] being or to his assistance when in need", the maxim (or principle) of not assisting "others (whom he could help) struggling with great hardships" will not survive Kant's proposed universality test, the Categorical Imperative, because "it is impossible to will that such a principle should hold everywhere as a law of nature"; a contradiction in the will emerges when it is seen that "by such a law of nature springing from his own will, [he would deprive himself] of all hope of the aid he wants for himself." 76

There is no indication that Nozick would disagree with Kant's view that we ought, morally speaking, to assist those in need — though he might disagree with Kant's reason for thinking so; i.e., that otherwise there occurs a contradiction in the will. On the contrary, an entire section is devoted to the issue of philanthropy and what people may do to help others voluntarily (265-268). Hence Nozick, notes Wolff, "does not seek to discourage private philanthropy. A libertarian may

73 Kersting, "Kant's Concept of the State", 153.
74 Ibid., 164, n7; italics mine.
75 Kant, Rechtslehre, 230/56.
76 Kant, Grundlegung, 423/32.
77 Wolff, Robert Nozick, 12.
78 Nozick, Philosophical Explanations, 503.
II

Natural Rights as Kantian "Side Constraints" upon Action

“Right is with me the child of law ...
A natural right is a son that never had a father.”

— Jeremy Bentham, Anarchical Fallacies

“Natural or human rights ... are fictions.”

— Alasdair MacIntyre, After Virtue

§ 16: Are there any natural rights?

This question composes the title of a now famous article by H. L. A. Hart, a question to which he, as a preliminary, answers: “I shall advance the thesis that if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.” 1 This is reminiscent of Kant, to whom, we noted in the previous chapter (§ 13), a natural right is an innate [angeborene] right, of which there is but one; namely, the (natural) right to freedom, “the only original [ursprüngliche] right belonging to every man by virtue of his humanity [kraft seiner Menschheit].” 2 Furthermore, Hart adds that he has “two reasons for describing the equal rights of all men to be free as a natural right”, namely that, “This right is one which all men have if they are capable of choice: they have it

1 Hart, “Are There Any Natural Rights?”, 77; italics mine.
2 Kant, Rechtslehre, 237/63.

3 Nozick is very clear that we have natural rights: “Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do.” (ix; italics mine) 4 One may say, roughly, that in a contemporary setting natural rights fall under the heading “universal human rights”.

But are there really any natural rights — and are there any human rights? If you ask ordinary people the latter question, they will respond that, “Of course there are; don’t say you haven’t heard of the U.N. Declaration on Human Rights! The only sense in which there aren’t human rights is in the sense for particular people or peoples because governments don’t respect their rights.” If you ask Alasdair MacIntyre both questions, he’ll tell you the following: “the latest defender of such rights, Ronald Dworkin (Taking Rights Seriously, 1976) concedes that the existence of such rights cannot be demonstrated, but remarks on this point simply that it does not follow from the fact that a statement cannot be demonstrated that it is not true (p. 81). Which is true, but could equally be used to defend claims about unicorns and witches.” 5

To return to Hart’s question, we may, with Jonathan Wolff, note the following aspects concerning the idea that there are natural rights:

It is a familiar and comforting notion that we all have rights, and that these must be respected. Countries which ignore the rights of their citizens are often the subject of intense international criticism. Nevertheless, the idea of a natural right is highly problematic. In fact, one of the features which makes a theory of natural rights initially so attractive turns out to be one of its main weaknesses. That is, the theory claims that natural rights are basic, fundamental, or axiomatic: they are the ultimate ground of all further decisions. This is attractive because it makes the theory seem so rigorous and principled. But the disadvantage is that we are left with nothing more fundamental to say in defence of these rights. Suppose an opponent doubts that there are any natural rights. How can we reply? Short of saying that the opponent must be insincere or confused, there seems nowhere left to turn. Using the terminology of natural rights may be a successful tactic in disputes between those who agree that there are such things, but

3 Hart, “Are There Any Natural Rights?”, 77-78.
4 I say that Nozick is here referring to natural rights because he believes that individuals have rights in the (Lockean) state of nature — that is, independently of all positive lawgiving (i.e., as Hart puts it, “not only if they are members of some society”); cf. 10 and my § 19 below.
5 MacIntyre, After Virtue, 67.
otherwise it seems to leave us dangling and exposed. 6

As noted in § 2, I shall not in this work devote much energy and space to discussing foundational questions as far as natural (or human) rights are concerned. Nor does Nozick in his book. We saw in § 7 that to the extent that there is a foundation for Nozick’s natural rights at all, it is a rather “loose” one, consisting mainly of the application of some kind of an intuitionistic procedure to underpin his set of rights. Thus, it is not unreasonable to hold that the Nozickian rights rest upon a somewhat “shaky” ground. In his 1971 essay on Ayn Rand’s position, Nozick complains that, “Some persons are not devoting thought to fundamental issues about morality, thinking that the essence of the job has already been done.”7 In his 1974 book, Nozick is not one of those persons; rather, he is one of those who doesn’t worry too much about the fact that this sort of job, as far as the moral foundations of rights is concerned, is yet to be done.

§ 17: Do people “count for something”?  

Though rights are poorly founded in Nozick, surely he must, since he so intensely defends the rights of individuals, think that humans have something worth, one is inclined to think — that this is the reason for his wanting them to have “strong and far-reaching … rights”. (ix) To one’s surprise, it is not clear that he thinks so. On the contrary, it is clear that he is sceptical about claims that human beings “count for something”: “Animals count for something. Some higher animals, at least, ought to be given some weight in people’s deliberations about what to do. It is difficult to prove this. (It is also difficult to prove that people count for something!”) (35-36) Indeed, there are many remarks that undermine this scepticism: “Why is the fact that a being is very smart or foresightful or has an I.Q. above a certain threshold a reason to limit specially how we treat it?” And, “Would beings even more intelligent than we have the right not to limit themselves with regard to us? … If a being is capable of choosing autonomously among alternatives, is there some reason to let it do so? Are autonomous choices intrinsically good?” (48) And later: “Why not interfere with someone else’s shaping of his own life? … Why are there constraints on how we may treat beings shaping their lives? Are certain modes of treatment incompatible with their

9 None of what I have here said is incongruent with the fact that Nozick’s rhetoric is very much in favour of the view that human beings in fact count for a lot, cf., for example, the book’s concluding rhetoric: “Treating us with respect by respecting our rights, [the minimal state] allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary cooperation of other individuals possessing the same dignity. How dare any state or group of individuals do more. Or less.” (334) The presence of such suggestive talk shouldn’t be allowed to conceal Nozick’s scepticism concerning the worth of humans.  


11 Wolff, Robert Nozick, 29.  

12 Scheffler, “Natural Rights, Equality, and the Minimal State”, 158. Simmons adopts Scheffler’s criticism of Nozick in this article in his (Simmons’) The Loechian Theory of Rights, 326.  

13 As regards the issue of the meaning of life, he also writes: “Suppose, for example, that one could show that if a person acted in certain ways his life would be meaningless. Would this be a hypothetical or a categorical imperative? Would one need to answer the further question: “But why shouldn’t my life be meaningless?” (50-51)
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might even think (though he doesn’t say so) that there are no good arguments in favour of the value of human life and so be a complete ethical sceptic. (Something he is not in Philosophical Explanations, we may notice.)

Would it make sense to assign rights to people even should one think they’re “worthless”? One may ask, for example, why it need be the case that humans should somehow “deserve” their rights; must they be capable of performing valuable function(s) (fill in the blank spot yourself) in order to have rights? Or, if no capacities are “needed”, is their having the DNA molecule sufficient ground for assigning them rights (an argument from some sort of a specieism)? (In which case we would presumably “start” having rights just as conception takes place; i.e., all abortions would be violations of a positive right to life.) Can an existential pessimist say simply and intelligibly, “I don’t think humans count for something. To tell you the truth, when I think of what they have done and still do to one another in this miserable place called Earth, I wonder whether it wouldn’t be for the better if the human race got extinguished once and for all (by accidentally being “naked”, through the universal spread of some deadly virus [Ebola like, perhaps], and so on) — yet I do want them to have rights until that day comes around; I see no point in not trying to reduce the sufferings of worthless creatures.” Normally, of course, the sufferings of a worthless creature wouldn’t be considered important. However, it would be possible to treat such creatures as equals. In Stanley Kubrick’s “Full Metal Jacket” a first sergeant makes the rookies suffer indeed, and to puncture any charge about his being racist, he declares: “Whether you are black, white, yellow, red, or whatever, I don’t care. To me, you’re equally worthless.”

Nozick observes that it is difficult to prove that people count for something. But suppose we could prove the opposite thesis: that humans don’t count for something — but that animals do. We now know that there are moral facts and how to observe them. Unfortunately for Hume (who thought there couldn’t be such facts). And unfortunately for humans (especially for those who hoped that Hume were wrong), there are no such facts about human beings; only animals have worth. They only are “surrounded” by moral facts. (Would that discovery make vegetarians and animals’ liberation activists happy or not?) May we dispose of something that has “no value at all” (here: humans) as we like?

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14 On the distinction between negative and positive rights, and on what is entailed by it, see the next section.
15 I shall say nothing as to the intelligibility of such a proof or to what such a proof might amount to.
fewer traffic lights per head in Tirana than in London.” Now, “only a minority of Londoners practise some religion in public places, but all have to negotiate their way through traffic. Those who do practice a religion generally do so on one day of the week, while they are held up at traffic lights every day. In sheer quantitative terms, the number of acts restricted by traffic lights must be greater than that restricted by a ban on public religious practice. So if Britain is considered a free society, why not Albania?”

Without discussing the plausibility of this attempted reductio ad absurdum of the idea of negative liberty, as regards the other side of the coin, positive liberty, one interpretation of it is this: “One is positively free only if one’s rational, true, or autonomous self is in control …” As none of us have ever met and will ever meet a person who is free in this sense, the idea of positive freedom seems, upon reflection, no less absurd than its “negative” rival. Or so one might think.

Now on which side, negative or positive freedom (liberty), may we place Nozick’s theory? The perhaps surprising answer is: on neither. The “surprise” part here has to do with the fact that his theory, though it is a libertarian theory, is not concerned with the maximization of liberty:

Some critics have argued against libertarianism by claiming that it is false on its own terms. It is not. Most versions of libertarianism are better understood not in terms of the maximization of liberty, but as negative rights theories, or what Nozick calls “side constraint” theories. Such theories posit certain rights that cannot be violated even if violating them would promote more liberty or rights (assuming there could be a metric of liberty and rights). If so, libertarianism cannot be condemned, on its own terms, for failing to maximize liberty, for it does not or need not claim to do so.

I do not mean to imply, of course, that liberty is not important in Nozick. For, as we shall see immediately — § 19 — there is an equal right to liberty. In this formal sense, there is an established, symmetrical liberty. It is engendered liberty Nozick “doesn’t care” about. (This is symptomatic: all in all, he deliberately avoids discussing engendered phenomena/empirical consequences; cp. my discussions in §§ 52 and 92 below.) G. A. Cohen, operating with a notion of engendered liberty, complains: “How is libertarian capitalism libertarian if it erodes the liberty of a large class of people?”; and, “‘libertarian’ capitalism sacrifices liberty to capitalism …” (Cf. also § 24 below.) Anyhow, I think that instead of the distinction negative/positive liberty, the distinction negative/positive rights is more helpful in understanding Nozick’s theory: “To clarify Nozick’s position we can distinguish two sorts of rights: negative and positive. If I have a positive right to something this entails that a particular person, or in other cases everyone, has a corresponding duty to provide me with that thing, or whatever is necessary to secure it. So if I have a positive right to life then others must provide me with things necessary to keep me alive. But a negative right to life does not have this implication. Rather it is a right to non-interference.”

Jeremy Waldron claims that, “People … disagree about the detail of … socioeconomic rights, but it is not now seriously suggested that rights to liberties are

19 Taylor, “What’s Wrong with Negative Liberty”, 219.

20 Ian Carter comments: “I think there are several things wrong with Taylor’s famous traffic lights example. For one thing, traffic lights generally serve to increase, not decrease, the overall quantity of action available to motorists. That is what they were designed for. Second, even disregarding this first point, it is not clear that Albanians have more freedom of movement overall than Londoners when we take into account factors other than traffic circulation. Third, … it can also be argued that restrictions on freedom of religion involve great restrictions on freedom of movement.” “The Independent Value of Freedom”, 824, fn13. (It is tempting to furnish Carter’s critique with the following headline: “What’s Wrong with Taylor’s Traffic Lights Example?”)

21 Wertheimer, Coercion, 259-260.

22 It should be added that Wertheimer doesn’t say he thinks so.

23 Wertheimer, Coercion, 259, fn37. Cp. Wolff, Robert Nozick, 139: “It would be a natural assumption that the concept lying behind libertarianism is liberty. Though natural, this is mistaken. … Nozick’s conception of liberty is particularly elided, and formal. Your liberty is your right … to do what you have a right to do.” G. A. Cohen observes that, “Anarchy, State, and Utopia is routinely characterized as libertarian, an epithet which suggests that liberty enjoys univalled pride of place in Nozick’s political philosophy. But that suggestion is at best misleading;” “Self-Ownership, World-Ownership, and Equality”, 67.


25 Wolff, Robert Nozick, 19. “A positive right is a claim to something … while a negative right is a right that something not be done to one. … Positive rights are always asserted to scarce goods and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways do not appear to have such natural, such inevitable limitations. … How can we run out of not harming each other, not lying to each other, leaving each other alone?”, Fried, Right and Wrong, 110. “The distinction between positive and negative claim-rights is (perhaps deceptively) simple. A positive right is a right to other persons’ positive actions; a negative right is a right to other persons’ omissions or forbearances. For every positive right I have, someone else has a duty to do something; for every negative right I have, someone else has a duty to refrain from doing something.”, Feinberg, Social Philosophy, 59. On the notion of a (Hohfeldian) claim-right, see § 23 below. Notice that positive rights are positive in quite a different sense from the one in which Berlin’s positive freedom is positive: others aren’t required to, nor can, provide you with anything material for you to be positively free. For the positive sense of free, Berlin notes, relate to my wishing to be my ‘own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind;” in sum, it is a matter of “self-mastery”; “Two Concepts of Liberty”, 131; 134.
the only sort of rights there can be."26 Apparently he here forgets Nozick (whom he discusses in the same piece), for Nozick does indeed seriously suggest that view. For in him there are no positive rights, socio-economic or other versions of such rights. (On why not, see § 26 below.)27 The basic, first-order rights are clearly negative ones.

§ 19: The four classes of Lockean (negative) first-order rights

We noted in Ch. I (§ 7) that the Nozickian rights are the Lockean rights. States Nozick: "I use "Lockean" rights and entitlements to refer to those (discussed in Part I) against force, fraud, and so on, which are to be recognized in the minimal state. ... I believe these are the only rights and entitlements people possess (apart from those they specially acquire), ..." (225, fn; italics mine)28 These rights are simply picked up by Nozick, without him ever addressing properly the question of why these are the (only) rights we (ought to) have and not some other, competing rights.29 (In the later Philosophical Explanations, however, he appears to be not so sure any more that the Lockean rights "are the only rights" there are: "In Anarchy, State, and Utopia, I presented a political philosophy based upon a certain view of the content of rights but did not (as I said there) present any moral foundations for that view. One might attempt to provide such a foundation either by working back from the view, step by step, or

26 Waldron, 'Introduction' to Theories of Rights, 11.
27 Technically, though, the right to compensation in certain cases could be construed as a socio-economic right. For example, if one prohibits an epileptic from driving one must remedy the disadvantages he then suffers (cf. 78-79). I discuss the principle of compensation, as well as the example of the epileptic driver, in § 43 below.
28 In speaking of acquired special rights, Nozick is employing Hartian rights terminology. According to Hart's usage, "special rights" are those arising out of special transactions between individuals — say contracts — whereas "general rights" do not arise at all but belong to all men in virtue of their being "capable of choice" (as he puts it). Applied to Nozick's position, the Lockean rights are general rights. See footnote 63 of this chapter for more information about Hart's distinction.
29 "Contemporary philosophers [like Nozick] who choose to work within the natural rights tradition need to explicate their use of natural rights terminology. Given the metaphysical associations of the tradition, such philosophers must explain what they mean by assigning rights to people. They must, further, say something about the source of these rights, and they must deal with a variety of epistemic questions. How do we know what rights people have? What sorts of evidence justify us in believing that people do have certain rights but do not have certain others? Nozick has painfully little to say about most of these issues.", Scheffler, "Natural Rights, Equality, and the Minimal State", 151-152. Cp. Wolff, An Introduction to Political Philosophy, 128: "if natural rights have a fundamental status, and so are not arrived at on the basis of some other argument, how do we know what rights we have? This difficulty was exploited by Bentham, who pointed out that if it is 'self-evident' that people have natural rights, why do different theorists have different ideas about what those rights should be? There are major inconsistencies between the accounts given by different political philosophers."
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Nozick speaks of “the precise contour of the bundle of property rights ...”) It is much more convenient, though, to speak of, say, my “property right” than of my “bundle of property rights” in an object and so I shall adopt the more convenient way.

Whence the “negativity” of the LHLP-rights, then? Their negative, non-interference nature is signaled by the word “harm”: I am required not to unduly harm you in the respects listed (by Locke), but I am not required to provide you with what you need in order to stay alive, to be in good health, to enjoy your liberty, or to take care of your possessions — though others may voluntarily engage in charity and so may give you, off the stock of their possessions, what is necessary for you to stay alive, etc. (cf. my discussion of Nozick’s — and Kant’s — anti-welfarist laissez-faire position in § 15 above).

§ 20: Partitioning and selling rights in oneself

In Nozick there is no principal difference between what I may do to my car and what I may do to myself; I can sell myself57 (in various ways), destroy myself (in various ways), and so on and so forth. And like with a car, people can have different rights about a person if the person chooses to: People may “partition the rights that until that time each person alone possessed over himself” — that is, the Lockeian LHLP-rights — “into a long list of discrete rights”, and so there will be a “vast array of rights” among which a person “desirous of more money” can sell, for example, “the right to determine whom of those willing to marry him he would marry, ...” (282)58

But there is a further, “lower” level of selling rights as well: Of people’s vast array of “particular rights over themselves”, perhaps they will choose not to sell each right completely, but will instead “sell separate shares of ownership” in it. (282; italics mine) Thus the right to marry those willing ..., say — with which I presume will be a partitioned “slice” of an individual’s right to liberty — will perhaps not be sold fully to another (his having a monopoly over the right) so that he alone may decide whom the seller would marry. Perhaps the seller sells shares

33 Cp. Simmons, The Lockean Theory of Rights: “Libertarian interpreters of Locke [maintain] that when Locke says we must "preserve the rest of mankind," he means only (reiterating his earlier claim) that we must preserve them by the negative means he goes on to mention immediately after.”; 60. “Nozick seems simply to ignore this side of Locke (Anarchy, 10). G. A. Cohen (no libertarian) also finds in [section 6] only negative duties of forbearance ("Marx and Locke," 383).”; ibid., 60, fn116.

34 In Locke, it is common to identify not four, but three classes of rights. Joel Feinberg, for instance, says that Locke “referred to three great classes of natural rights, the rights to ‘life, liberty, and property.’”; Social Philosophy, 61. Cp. Wolff, Robert Nozick, 26. “Locke argued for natural rights to ‘Life, Liberty and Estate’, a view with clear affinities to that of Nozick;” Probably Locke meant “health” (in text, 6 of the Second Treatise) to be, primarily, a deepening of “life”. Still, it is Nozick, for analytical purposes, I find it appropriate to speak of four classes of (Lockean) rights. See my discussion below, in particular § 33.

35 Furthermore, several people can jointly possess the same right, using some decision procedure to determine how that right would be exercised.” (282)

36 I say “unduly” to accommodate the exception “unless it be to do Justice on an Offender ...”, i.e., in such cases I may harm you.

37 You may sell rights because you (literally) own yourself, see my elaboration on the thesis of self-ownership below, § 32.

38 One tends to think that a person wanting to sell this right is a person who has never been married; how else is it to be explained that he is willing to let others decide whom he ends up with? (One tends to think also that retaining the right to decide whom one ends up with might be for the worse.)
of ownership in the right to several others so that there will be many shareholders taking part in the decision. So now any given number of others have together full control over this (former) right of the seller, the degree of each person’s control dependent upon how many shares he owns. Or perhaps no particular right will be sold fully to others because people will prefer to keep “one share in each right as their own, so they can attend the stockholders’ meeting if they wish.” (284) Thus, even a number of people decide to exchange their right to liberty for money, partitioning that right into a (long) list of discrete rights (that is, into many “slices”, not just the one about marrying), selling shares of ownership in each discrete right, perhaps they will not sell 100% of the shares in any of them (or perhaps 100% in some). (For example, I keep one share in my right to marry those willing ...) If so, my right to liberty is not sold away completely, and so “no persons completely sell themselves into slavery” (283) — though they may; cf. 331 and my discussion in § 67 below.39

§ 21: The right to self-defense, to punish, and to exact compensation: the three second-order rights of enforcement

No one ought to harm you in the sense violate your LHLP-rights. But what if someone is about to do so or just did (and so acts or acted contrary to the [normative] law of nature)? In these events, you have a second-order natural right to attempt to enforce your first-order (natural) LHLP-rights: “that executive Power of the Law of Nature, which every Free-man naturally hath, ...”40 This right (or power), holds D. Lloyd Thomas, “has three main aspects: 1. The right to judge for yourself what actions are and are not in accordance with the law of nature. 2. The right to restrain attempts to violate the law of nature, using force if necessary. 3. In the case of those who, in the light of your conscientious judgement, have violated the law of nature, the right to judge what is the appropriate punishment, and to attempt to impose that punishment.”41 This right is discernable as second-order since it is “parasitic upon first-order natural rights. If people did not have first-order natural rights there would be nothing the

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39 Many will point out that there’s a huge difference (not least a morally significant difference) between being “supplied” with a wife and a slave master, respectively. Others will find themselves unable to comprehend the difference here.

40 Locke, Second Treatise, sect. 74, 317; italics mine. However, Locke thinks that when everyone in the state of nature has the executive power of the law of nature, this entails important “inconveniences” for which, he says, “I easily grant, that Civil Government is the proper Remedy, ...” ibid., sect. 13, 276.

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nature everyone has the right to punish on behalf of anyone.44 That right is “put
into every Mans hands”, so that “every one has a right to punish . . . transgressors . . .”45 Were this not so, i.e., if only the victim were allowed to punish his assaulter, “then obviously those who commit murders would go unpunished.”46

Notice that Nozick says an individual may “exact compensation, and punish.” (12; italics mine) Now, exacting compensation from someone is not the same as punishing that someone. True, if you stole something from me, whether I receive (after having rightfully demanded) a check from you to cover the price of it or whether I imprison you for some time for having stolen it, in both cases I “make you pay”. But Locke distinguishes between my exacting compensation from you and my incarcerating you: “besides the right of punishment common to him with other Men”, an individual has “a particular Right to seek Reparation” (that is, exact compensation) from an offender, and so may recover “from the Offender, so much as may make satisfaction for the harm he has suffer’d.”47 Thus a distinctive feature of the right to exact compensation is that it is a right held exclusively by the victim, whereas the right to punish is held by all: “In contrast to exactation of compensation, which it views as something done appropriately only by the victim or his authorized agent, state-of-nature theory usually views punishment as a function that anyone may perform.” (137) This is consistent with Locke’s position, according to which “any other Person who finds it just, may also join with him that is injur’d, and assist him in” his execution of compensation.48 Accordingly, Lloyd Thomas’ list of three aspects of the right to enforce one’s rights needs an additional aspect four including the “Right to seek

44 This view entails a system of open punishment (the punishing is open to anyone to carry out). Such a system in Locke, argues Simmons, “is a morally acceptable (and morally-motivated) system.”; The Lockean Theory of Rights, 159. Nozick, however, has grave doubts as to whether such a system will work, wondering, among other things, “Will sadists compete to be first to get their licks in?” (138) In the end, he believes the open system is indefensible.

45 Locke, Second Treatise, sect. 7, 271. Continues Locke: “For the Law of Nature would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a Power to Execute that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so. For in that State of perfect Equality, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do.”; ibid., sect. 7, 271-272. (“The standing of persons is equal in the state of nature. Therefore if anyone has the power to enforce the law of nature, everyone must have it.”; Lloyd Thomas, Locke on Government, 21.)

46 Wolff, An Introduction to Political Philosophy, 22.

47 Locke, Second Treatise, sect. 10, 273; first two italics mine.

48 Ibid.

49 Wolff, Robert Nozick, 34.

50 A transfer of the right to punish doesn’t seem to constitute an alienation of it, though. For example, the people may depose the ruler if he turns tyrannical and thus recover their former powers. Having said that, we may note that it is a matter of controversy whether Locke actually defends “the thesis of inalienability” as far as natural rights are concerned. The Locke scholar A. John Simmons reports that, “I can find nowhere in Locke’s writings any use of the term “inalienable” (or “unalienable”);” and, “If [my] reading of Locke is accurate, it strongly suggests that he did not think of the moral limits on government as limits set by citizens’ inalienable rights; and in the absence of evidence from other aspects of Locke’s arguments, it would seem to establish a strong prima facie case against regarding Locke, at any point in his writings (except for his position on paternal power), as a conscious defender of the thesis of inalienability.”; On the Edge of Anarchy, 109, 119. On Nozick’s defence of the thesis of the inalienability of rights, and on Kant’s rejection of it, see below, §§ 69 and 83.

51 Locke, Second Treatise, sect. 9, 272.

52 Ryan, “Review of Wolff”, 156.
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accused of war crimes, suspects whom local governments refuse to put to trial? 

Some final remarks on the issue of self-defence. On this issue Nozick goes beyond Locke, introducing the topic “innocent threats” and “innocent shields of threats”, the question being whether you may kill such threats in self-defence. More precisely: may you kill completely innocent people in order to save your own life? An instance of the first type of threat, innocent threats, is this: “If someone picks up a third party and throws him at you down at the bottom of a deep well, the third party is innocent and a threat; ... Even though the falling person would survive his fall onto you, may you use your raw gun to disintegrate the falling body before it crushes and kills you?” (34) One may want a realistic example here, not one of science-fiction; I guess one could be produced, though I can’t, for the moment, think of one. Nozick’s example of an innocent shield of threat is realistic enough, though (sadly realistic): “Innocent persons strapped onto the front of the tanks of aggressors so that the tanks can’t be hit without also hitting them ...” (35) To these, as well as to other, “incredibly difficult issues” Nozick admits of having no definite answers, preferring to “tiptoe around” them. (35)

§ 22: Are rights of enforcement negative rights?

“Whether we should classify [the] rights to self-defence and to punish offenders as negative rights is hard to decide.”, I. Wolff believes, for, “On the one hand, rights to punish and defend oneself are not rights to non-interference. On the other hand, they are not, in themselves, rights to aid or assistance either.”55 I, however, believe that this view is at variance with what Nozick himself says: “rights of enforcement are themselves merely rights; that is, permissions to do something and obligations on others not to interfere.” (92) This seems to me to be a statement that rights of enforcement are negative rights:

others may not interfere with your exercising your rights of enforcement.56 I.e., they may not stop you as you try to defend yourself against, or as you try to punish, an offender — nor as you try to exact compensation from him (a right left out in Wolff’s [and Lloyd Thomas'] account, we remember). Meaning that others may not violate your (second-order) natural right to enforce your rights — like they may not violate your (first-order) LHLP-rights.

§ 23: The Nozickian rights as Hohfeldian rights: an attempt at interpretation

If one says that “P has a right to X”, the legal theorist Wesley Hohfeld noted, this phrase may be interpreted in a number of ways.57 Let me emphasize that the Nozickian rights may also be interpreted in a number of ways as far as their being Hohfeldian rights is concerned. What follows is no exhaustive analysis of them as such rights; there may by alternative, more comprehensive, ways of attempting to interpret them. Let it be noted also that Nozick does not put forward his conception of rights within an explicit Hohfeldian framework; in fact, Hohfeld is barely mentioned (cf. 175). Any reader wishing to understand the Nozickian conception of rights with the aid of Hohfeldian terminology must therefore resort to some construal or other. Here is mine.

The phrase (“P has a right to X”) may mean “P has no duty (to a particular person Q or to people in general) not to do X.”, implying P has the “privilege” (Hohfeld’s term), or, as is sometimes said, the bare liberty, to do X. For example, Nozick characterizes the right to punish as a liberty: “Certain wrongdoing gives others a liberty to cross certain boundaries (an absence of a duty not to do it); the details might be those of some retributive view.” (137-138)58 This way of putting it accords with Joel Feinberg’s analysis, on which “A liberty or privilege ... is simply the absence of a duty. To say that Doe is privileged or at liberty to do X is to say that Doe has no duty to refrain from doing X. [For example,] Doe has the legal privilege of striking back in self-defense; he is free of his usual duty of forbearance.”59

The phrase may also be interpreted as meaning “Q (or everyone) has a duty to

53 Cp. Simmons, The Lockeian Theory of Rights, 165, fn79: “remember the attitude of the Allies at the Nuremberg trials, where German war criminals were prosecuted for moral (not legal) crimes against German citizens, committed on German soil. Was it not within the rights of the Allies to punish the monstrous acts of these criminals? The Lockeian view implies an affirmative answer.”

54 One other issue is this: “If one may attack an aggressor and injure an innocent shield, may the innocent shield fight back in self-defense (supposing that he cannot move against or fight the aggressor?). Do we get two persons battling each other in self-defense?” (35) Nozick’s discussion of these issues has received considerable attention in the literature. See, for example, Judith Jarvis Thomson’s “Self-Defense and Rights”, 38, 41, and her The Realm of Rights, 369-371.

55 Wolff, Robert Nozick, 34.

56 Except for the victim of my exercise of these rights, perhaps, who might not be sure that I will in my exercise of them observe proportionality.

57 See Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning.

58 “Boundary” is Nozick’s word for the “moral fence”, as it were, of (negative) natural rights that surrounds or circumscribes an area in moral space around an individual.” (57), for further detail on the boundary view, see § 40 below. For some remarks on retribution, see my Ch. III, footnote 24.

59 Feinberg, Social Philosophy, 56.
let P do X.” Thus the duty here gives P some sort of claim against Q (or everyone); hence the right to do X so understood emerges as a claim-right.\footnote{Talk of P’s claims “hists”, writes Thomson, at P’s “actually having made some claims (as a person ... does if he announces that he has such and such rights or, more strongly, demands that he be accorded him). We have to remember that Hohfeld has none of this in mind in using, and inviting us to use, the term “claim”. He means merely: right in the strictest sense, thus right that is the correlative of duty.”; \textit{The Realm of Rights}, 40-41.} However, at this point the following should be observed: “Of course, ‘to let P do X’ is a loose phrase, and a claim-right may involve anything from a purely negative duty not to impede P’s action to a positive requirement to do what one can to make it possible for P to do X.”\footnote{Waldron, \textit{Introduction} to \textit{Theories of Rights}, 6. In passing, we may notice that although Hohfeld’s are fundamental legal (not philosophical) conceptions, his “claim-right is generally regarded as coming closest to capturing the concept of individual rights used in political morality.”; \textit{ibid.}, 8.} Claim-rights are thus of two sorts: negative and positive. In Nozick, we have seen, there are only negative rights; accordingly there are only negative claim-rights. If “X” = “live”, unless in self-defence, I may not kill P but I am not required to provide P with food that makes it possible for P to stay alive; cf. my example in § 7 above.

Furthermore, the Nozickian natural rights are claim-rights in rem: they are rights that hold “against the world at large.”\footnote{Feinberg, \textit{Social Philosophy}, 59.} as Feinberg puts it\footnote{In \textit{personam} rights are similar to “special rights” in Hart: “When rights arise out of special transactions between individuals ... both the persons who have the corresponding obligation are limited to the parties to the special transaction ...”; \textit{ibid.}, 87.}, meaning that everyone has a duty not to interfere with them. Claim-rights in \textit{personam}, on the other hand, concern rights (and corresponding duties) arising out of a contract between particular individuals (and are thus not “natural”); for example, a right of a creditor against his debtor.\footnote{Typically, notes Feinberg, “in \textit{personam} rights are positive and in rem rights are negative. My in \textit{personam} right against Jones to repayment of his debt is a right to positive action from him, whereas my} 

60 Talk of P’s claims “hists”, writes Thomson, at P’s “actually having made some claims (as a person ... does if he announces that he has such and such rights or, more strongly, demands that he be accorded him). We have to remember that Hohfeld has none of this in mind in using, and inviting us to use, the term “claim”. He means merely: right in the strictest sense, thus right that is the correlative of duty.”; \textit{The Realm of Rights}, 40-41.

61 Waldron, \textit{Introduction} to \textit{Theories of Rights}, 6. In passing, we may notice that although Hohfeld’s are fundamental legal (not philosophical) conceptions, his “claim-right is generally regarded as coming closest to capturing the concept of individual rights used in political morality.”; \textit{ibid.}, 8.


63 In \textit{personam} rights are similar to “special rights” in Hart: “When rights arise out of special transactions between individuals ... both the persons who have the corresponding obligation are limited to the parties to the special transaction ...”; \textit{ibid.}, 87. \textit{In rem} rights are similar to Hart’s “general rights”, rights which, although they “share two important characteristics with special rights” (characteristics not to be rehearsed here), nevertheless “do not arise out of any special transaction between men.” but “are rights which all men capable of choice have ...”; \textit{ibid.}, 87, 88. (We may note here, without rehearsing that either, that Nozick finds Hart’s argument for the existence of a natural right a rather poor one. Nozick claims that the “well-known argument of Hart’s is puzzling”, remarking that, “I may release someone from an obligation not to force me to do A. (I now release you from the obligation not to force me to do A. You are now free to force me to do A.”) Yet so releasing them does not create in me an obligation to them to do A.”)\footnote{Feinberg, \textit{Social Philosophy}, 60.} \textit{In rem} rights are rights that hold “against the world at large.”\footnote{I owe this objection, and the example, to Thomas Pagge.} Feinberg holds that “one person’s active rights can be protected only at the expense of another’s passive rights, and vice versa.”\footnote{Feinberg, \textit{Social Philosophy}, 60.} Bypassing the question of whether this is true in general, that the protection of one person’s (active) right
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to his property is possible only at the expense of another’s (active) right to go where he will, for example, is certainly true: the more land you own, the less may I go (move) where I will — the less may I exercise the “slice” of my right to liberty known as the right to freedom of movement. It might be that I would like to go fishing on a lake in an area owned by you, but without your permission I may not. If I go fishing there against your will I will be violating your property right (or some bundle of property rights) in the land. (Recall Nozick saying that, “The central core of the notion of a property right in X ... is the right to determine what shall be done with X; ...” [171]) And so you may force me — re-move me — off your land (yourself in the state of nature, in the minimal state by phoning the police to have them show up and apply coercion to the same effect).

In speaking of “at the expense of” in this connection I am not speaking of rights being violated, but of the worth of particular rights changing. The distinction established/gendered (that I introduced in § 18) is helpful here. There is an established right to freedom of movement, which may be conceived of as threecfold: the right to move around on land which is (a) owned by me; (b) unowned, or (c) owned by others whose permission to trespass I have obtained. Accordingly, the worth of this right to me waxes and wanes depending upon the “size” of (a), (b), and (c) at different points in time. Therefore there is no competition, or conflict, between A’s right to hold property and B’s right to freedom of movement. If A refuses to let B go fishing on his (A’s) lake he doesn’t violate B’s right to freedom of movement because B has then no right to move on A’s land — whereas B violates A’s property rights if he defies A’s refusal and goes fishing anyway (as I just said).

In a libertarian world with very extensive private ownership of land, a lot of persons’ freedom of movement might “suffer” because of landowners’ rights; that freedom might be of very little worth to them. Pogge believes (with G. A. Cohen, he notes) that, in several respects, “Under [Nozick’s libertarian scheme] the freedom of large segments of the population is likely to be very severely restricted.” I think Nozick would in fact grant that this is likely with respect to freedom of movement. My reason for thinking so is that he sees a serious problem with (the right to) freedom of movement within his own scheme:

The possibility of surrounding an individual presents a difficulty for a libertarian theory that contemplates private ownership of all roads and streets, with no public ways of

69 Pogge, Realizing Rawls, 45.

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access. A person might trap another by purchasing the land around him, leaving no way to leave without trespass. It won’t do to say that an individual shouldn’t go to or be in a place without having acquired from adjacent owners the right to pass through and exit. Even if we leave aside questions about the desirability of a system that allows someone who has neglected to purchase exit rights to be trapped in a single place, though he has done no punishable wrong, by a malicious and wealthy enemy (perhaps the president of the corporation that owns all the local regular thoroughfares), there remains the questions of “exit to where?” Whatever provisions he has made, anyone can be surrounded by enemies who cast their nets widely enough. The adequacy of libertarian theory cannot depend upon technological devices being available, such as helicopters able to lift straight up above the height of private airspace in order to transport him away without trespass. (55, fn; italics mine)

Can Nozick escape these difficulties pointed to by himself, can he resolve them? He notes in the next sentence that, “We handle this issue by the proviso on transfer and exchanges in Ch. 7.” (55, fn) To make that proviso relevant to the topic of freedom of movement, we may focus upon the following: “If the proviso excludes someone’s appropriating all the drinkable water in the world, it also excludes his purchasing it all. (More weakly, and messily, it may exclude his charging certain prices for some of his supply.)” (179) Suppose A purchases all the land in the libertarian world. Presumably — though Nozick doesn’t actually say so — this circumstance “brings into operation the Lockeian proviso and limits his property rights.” (180) Now, “Once it is known that someone’s ownership runs afoul of the Lockeian proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) “his property.”” (180; italics mine) The proviso will “provide [an] opportunity for ... state action.” (182) and so the (minimal) state, in this case, is permitted, I take it, to override A’s property rights in order to let an entrapped individual B move about on A’s land without A’s consent.70

It is clear that Nozick believes that, “This proviso (almost?) never will come into effect; ...” (179), and that “the free operation of a market system will not actually run afoul of the Lockeian proviso.” (182) Whether or not we share Nozick’s faith here, we may, for our purposes, avoid discussing any further which situations will and which situations will not bring into operation the Lockeian proviso. For in any case the proviso, in setting the baseline for it to be triggered off so low (it is invoked only “to avoid some catastrophe.” [180]), is a very weak one and so B’s (right to) freedom of movement may legitimately, i.e.,

70 However, “Overridden rights do not disappear; they leave a trace of a sort absent in the cases under discussion.” (180)
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in principle, be very severely restricted even though it may not be totally restricted (due to the proviso) — regardless of whether, in a libertarian world, it will in fact turn out to be very severely restricted. We have just seen that Nozick says (in a parenthesis) that the proviso, “More weakly, and messily, ... may exclude [someone’s] charging certain prices for some of his supply.” (179) if he owns all the drinkable water in the world. I conjecture a sufficiently similar condition holds true for his owning all the land in the world as well; certain prices A will want to charge for B’s trespassing on his land the proviso will nullify. But even a price not that high might be too high still for B; if he can’t afford this price either — and it is not unlikely that a libertarian world will contain many quite poor people not having the requisite capital for the “ticket” — the protection of A’s (passive) right to his property will indeed take place at the expense of B’s (active) right to liberty (freedom); here: the “slice” of that right known as the right to freedom of movement (“to go where one will”). Which, again, is not to say that B’s right to freedom of movement is violated.

§ 25: Rights with “hooks”, (the right to) freedom of speech, and discrimination

Another slice of the (active) right to liberty is the right to freedom of speech — to “say whatever one pleases”, as Feinberg put it. Nozick mentions this right in connection with his image of rights with “hooks”:

Rights to engage in relationships or transactions have hooks on them, which must attach to the corresponding hook of another’s right that comes out to meet theirs. My right of free speech is not violated by a prisoner’s being kept in solitary confinement so that he cannot hear me, ... nor are the rights of readers violated if Josef Goebbels is executed and thereby prevented from providing them with additional reading material. In each case, the right is a right to a relationship with someone else who also has the right to be the other party in such a relationship. ... If rights to engage in relationships go out only half-way, ... others do have a right to hear whatever opinions they please, but only from persons who have a right to communicate them. Hearers’ rights are not violated if the speaker has no hook to reach out to join up with theirs. (The speaker can lack a hooked right only because of something he has done [the right may be forfeited in punishment for wrongful acts], not because of the content of what he is about to say.) (264-265)

It is the parenthesis which should command our attention here. In it, I shall claim, Nozick holds that you may indeed say “whatever you please”. I claim that since he clearly takes an utterance’s content to be irrelevant as regards the question of whether you may speak your mind. Now, if we look to the chapter on prohibition, compensation, and risk (Chapter 4) — see also my discussion of this chapter below — we’ll find Nozick saying that, “The argument from general fear justifies prohibiting those boundary-crossing acts that produce fear even when it is known that they will be compensated for.” (71) Shortly before this passage there is once more a parenthesis which should command our attention. In it, it is said that, “one should not leap to the conclusion that when it is known that compensation will be paid, only physical injury or pain is feared and viewed with apprehension. Despite knowing that they will be compensated if it occurs, people also may fear being humiliated, shamed, disgraced, embarrassed, and so on.” (70) This seems equivalent to saying that an utterance’s content sometimes does matter: its content — say humiliating statements — may produce fear. If the state’s officials happen to know about the fear-producing content “of what he is about to say,” (264-265), would they then be justified in prohibiting the would-be speaker from speaking? That depends, at a minimum, upon the issue being that of fear of a boundary crossing (rights violation): if that is not what is feared, the question of prohibition does not arise at all, no matter how great the fear in an individual of being humiliated, etc. The question then is whether there is such a thing as boundary-crossing speech. Nozick doesn’t explicitly say. But perhaps he would think of threats of, or calls for, violence as that kind of speech. My reasons for this conjecture are as follows.

Shifting focus for a moment and looking at the post-libertarian position of “The Zigzag of Politics”71, the question of limits on free speech is addressed thus:

We might be led, even, to weigh limits on a liberty as important as speech and assembly. Consider KKK members in white costume marching through neighborhoods largely populated by blacks, people in Nazi uniforms with swastika banners marching through largely Jewish neighborhoods, and marchers through Native American Indian reservations, Asian-American communities, Armenian neighborhoods, or significantly gay neighborhoods, with similarly pointed and offensive banners. Must the residents in their home neighborhoods be asked to endure such declaiming and flaunting of support for previously widespread evil (and illegal) actions — murderous, enslaving, genocidal, persecutory — directed at a group membership that is part of their very self-conception? Must we simply hope that other peaceful citizens from outside will express solidarity with these victimized groups by sitting atwart the path those marchers to bar their way, showing a concern great enough to incur arrest and jail sentences for obstructing that march? Or can we formulate specific principles whose scope is “tailored” to this very kind of situation, in order to legally bar such incursions, while mindful still of our general

71 On Nozick’s rejection of his former libertarianism, see § 5 of my Introduction.
and strong commitment to the free interplay of opinions within the society.\footnote{Nozick, “The Zigzag of Politics”, 291, fn.}

One thing is such marchers’ “support for previously widespread evil (and illegal) actions”; it is something quite different, it might be thought, to try to get someone to perform illegal actions — i.e., using one’s freedom of speech to encourage him to violate the rights of others. There is evidence that the libertarian Nozick would think such utterances illegitimate and punishable: “a person who persuades another to do something” can indeed “be held responsible for [and] punished for the consequences of the other’s action.” (130)\footnote{See my Ch. III, footnote 24, for further detail on Nozick’s — and for a remark on Kant’s — view of punishment.} Furthermore, in speaking of “the constitutional limits on free speech”, he remarks that, “perhaps something like the following narrow principle is defensible: If there are actions which it would be legitimate for a university to punish or discipline students for doing, and which it would be legitimate for a university to punish or discipline faculty members for doing, then if a faculty member attempts to and intends to get students at his university to perform these actions and succeeds (as he had intended), then it would be legitimate for the university to discipline or punish the faculty member for this.” Now this issue, he continues, also raises “the messy questions about what channels of persuasion are covered by the principle; for example, speeches on campus outside class, but not a column written in a local town or city newspaper.” Those questions, he says, “I ... ignore.” (342, n6)\footnote{As far as the liberty of free speech and assembly is concerned, J. S. Mill, for instance, claims that, “even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischiefous act.” Thus, “An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, ...”; On Liberty, ch. 3, 123.}

Whereas, on the libertarian account, the right to free speech doesn’t seem to include the right to persuade another to perform a punishable, boundary-crossing act — say, KKK members persuading someone to beat up blacks — the production of racist statements doesn’t in itself seem to constitute boundary-crossing speech. For no matter how great a black person’s fear of being disgraced by racist utterances is, such utterances do not cross any boundary of his and so the question of prohibition doesn’t arise.

But what about discrimination? Do you cross a person’s boundary if you discriminate against him? In Chapter 9, the section concerning an imagined
derivation of a more-than-minimal state (280-292), there is a reference to antidiscrimination rights. We saw in § 20 that Nozick imagines people selling rights in themselves. Some rights “might be of real use or benefit to others” because these others “want these rights or want to exercise a say in them [for] various reasons of their own.” (282-283) Among these rights (out of “a long list of discrete rights” [282]) that people sell are, “the right to decide whether or not they would use LSD, or heroin, or tobacco\footnote{Would it be correct to say that smokers sell their right to smoke to a owner of a “no smoking” restaurant as they enter it, if only for the time of their stay?}, or calcium cyclamate (drug rights)\footnote{Perhaps people engaged in “the war on drugs” will be glad to hear a doctor say the following: “Look you people, it is none of your business if I go for a daily dose of amphetamine to keep me working around the clock in my medical practice; besides, if it weren’t for the amphetamine I wouldn’t be making such big money. But now I propose selling my drug rights to you and so my using or not using narcotics can be your business only.” (Presumably this doctor will charge a very high price for his drug rights: say a price somewhere in the neighbourhood of the amount of income that is lost when he is no longer able to work around the clock.) It should be remarked that your drug rights do not entail that you may take drugs in situations in which your intoxicating yourself has the effect of making you dangerous to other people — that is, you risk violating their rights. For some remarks on this issue, see § 46 below. (See also footnote 43 of the present chapter, the example of the two loaded street criminals whom you may kill in self-defense, whereas these people have the right to take drugs, they do not have the right to take drugs downtown because this, apparently, makes them a threat to you. The situation would be different if the intoxication caused them to just smile and say a friendly hallo as you walked in front of them, then there would remain only the threat to your property [in contrast to a threat to your property and body] since they are after your Roles and other valuable things on you. [Or there mightn’t be a threat against your possessions at all; who would take seriously smiling, friendly people who tell you to hand over to them your watch? “You must be joking!” would be the standard reaction. Or if one of them lay hands on you, smiling in his most harmless way, you’d probably respond, angrily: “This joke has gone too far! Let go of my arm, you silly man!”])}, the right to determine their permitted mode and manner of sexual activity (vice rights)\footnote{Would people fond of so-called gay bashing start purchasing vice rights from homosexuals willing to sell these rights?}; the right to decide what grounds were illegitimate in hiring or selling or renting decisions (antidiscrimination rights); ...” (283) Does this mean that a person has antidiscrimination rights which he can sell; that I can buy from you the right to discriminate against you (so as to make my discrimination of you legitimate)? If so, if you do not sell these rights to me I will be violating your right not to be discriminated against (I will cross a boundary of yours) if I choose to discriminate against you without these rights being in my possession. (Compare denying someone to use LSD without having bought any drug rights from him.)

But the reference to antidiscrimination rights can easily be understood differently: you may buy from me the right to constrain how I make certain
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decisions — as regards my land, for example. This understanding is also congruent with the statement that, “Any private owner can regulate his premises as he chooses.” (323) Suppose I have instituted a system of apartheid on my land and offer people to live there subject to my regulations. Let’s say that some of your best friends have just recently moved to my community and you would like very much to live there too, enjoying their company as before. The only trouble is that your friends are white and you are black, and so you will be kept apart from them even if you decide to live in my community. Then, if I am willing to sell it, you can buy from me the right not to be discriminated against and thus enjoy your friends’ company after all. Thus you, in buying this right from me, constrain my decisions; you have bought the right to “transcend” my system of apartheid.

But although a private owner can discriminate as he thinks fit (his premises being discrimination in some sense of the word), this leaves unresolved the issue of discrimination on public land:

May the majority of the voters in a small village pass an ordinance against things that they find offensive being done on the public streets? May they legislate against nudity or fornication or sadism (as consenting masochists) or hand-holding by racially mixed couples on the streets? Any private owner can regulate his premises as he chooses. But what of the public thoroughfares, where people cannot easily avoid sights they find offensive? ... And whence this emergent right of the majority to decide? Or are there to be no “public” place or ways? (Some dangers of this, noted in Chapter 2, would be avoided by the Lockeian proviso of Chapter 7.) Since I do not see my way clearly through these issues, I raise them here only to leave them. (323)78

In closing this section, let me point out that the post-libertarian position does however hold that, “concerning blacks, women, or homosexuals, for instance ... there is justification for antidiscrimination laws in employment, public accommodations, rental or sale of dwelling units, etc.”79

§ 26: Why (Nozick thinks that) rights cannot conflict

We have seen that the worth of rights may vary (considerably) — cf. § 24 on the issue of the relation between property rights and the right to freedom of movement — without there being a conflict between rights. It is important to keep in mind that on Nozick’s conception of rights, rights cannot conflict, either; a clash of rights isn’t even possible. Let’s see why this is so.

To speak of “everyone’s having a right to various things such as equality of opportunity, life, and so on, and enforcing this right” is objectionable, Nozick holds. For “these ‘rights’ require a substructure of things and materials and actions” over which “other people may have rights and entitlements”. (238) (Notice the quotation marks on the kind of rights which would qualify as positive rights.) Thus, as far as the right to life is concerned, Nozick also rejects Ayn Rand’s libertarian position:

[According to Rand, property rights] follow from the right to life, since people need physical things to live. But a right to life is not a right to whatever one needs to live; other people may have rights over these other things (...) At most, a right to life would be a right to have or strive for whatever one needs to live, provided that it does not violate anyone else’s rights. ... Since special considerations (such as the Lockeian proviso) may enter with regard to material property, one first needs a theory of property rights before one can apply any supposed right to life (as amended above). Therefore the right to life cannot provide the foundation for a theory of property rights. (179, fn)80

So a right to life is “supposed” only — whereas a right not to be harmed in one’s life is not (cf. also §§ 18 and 19 above). (Given Nozick’s poor foundation for his preferred set of rights — cf. §§ 7 and 16 above — it is hard to resist the temptation to say that the latter, negative, right is no less supposed [by him].)

But this is not to say that one cannot have a (positive) right to life in Nozick: If an individual’s “goal requires the use of means which others have rights over, he must enlist their voluntary cooperation” and thereby he can, if others so cooperate, “acquire a right to, for example, food to keep him alive” (238) (a primary goal of his, one will think). Acquired (as distinct from natural) rights will thus be claim-rights in personam — or, if you like, Hartian special rights.81

78 That one doesn’t see one’s way clearly through some issue seems in general a bad excuse for just raising and immediately leaving an issue; were philosophers to use that argument generally, presumably there wouldn’t be many philosophy books around. What is more, the issues raised here may be thought to be just too important to Nozick’s position for him to simply skip them. The fleeting reference to the role to be played by the Lockeian proviso — cf. my discussion in § 24 above — is of little aid here; much more detail is needed for us to see the proviso’s relevance in these matters.


80 For another attack of Nozick’s on Rand, see his “On the Randian Argument”. (For an attack on this particular attack [i.e., a counter-attack], see Den Uyl and Rasmussen, “Nozick on the Randian Argument”, in which they claim, “that Nozick’s criticisms of Rand fail completely, and that they fail largely because Nozick has not understood or appreciated either the content or philosophic methodology of Rand’s thinking and thought.”; 233.)

81 “When rights arise out of special transactions between individuals ... both the persons who have the right and those who have the corresponding obligation are limited to the parties to the special
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sum, “There are particular rights over particular things held by particular persons” and these rights “fill the space of rights, leaving no room for general rights to be in a certain material condition.” (238; italics mine) That is, there is in Nozick no room for anything but negative claim-rights in rem (as we pointed out in § 23). (The talk of an [on the Nozickian conception, necessary] absence of “general” rights to be in a certain material condition I take to be an implicit reference to a Hartian general right.82) To conclude the Nozickian view in the philosopher’s own words, then: “No rights exist in conflict with this substructure of particular rights. Since no neatly contoured right to achieve a goal will avoid incompatibility with this substructure, no such rights exist.” (238)

We can put this conclusion another way: As there exist no positive rights but only negative ones, conflicts cannot take place; whereas a positive right to life of mine may “collide” with your negative right to your property83, my negative right to life will almost never come into conflict with your equal right. I say “almost” because the cases of killing an innocent threat in self-defence appear to involve such conflicts: in these cases the threatened person’s negative right to life conflicts with the innocent threat’s identical right (cf. § 21 above). This is not to say, however, that Nozick’s view is wrong or even inconsistent; it is not to say, for example, that his claim that, “individual rights are co-possible” (166) is misguided. For we should recall that Nozick has no solution, nor claims to have a solution, to the “incredibly difficult issues” (35) related to cases of killing an innocent threat in self-defence. Nonetheless, exactly because of these yet to be resolved issues, which “a view that says it makes nonaggression central must resolve ... explicitly at some point.” (35), Nozick at least seems to put the point too strongly in insisting upon the co-possibility of individual rights within his system of thought.84 Waldron writes that on Nozick’s “conception, rights are

more or less incapable of conflicting with one another.”85, but doesn’t explain the “more or less”. But if I am correct in my remarks on the issue of killing an innocent threat in self-defence, those remarks might be taken as one appropriate explanation here. (There may of course be alternative explanations.)

Pogge notes that in Nozick, “The question of whether to violate someone’s right in order to fulfill the rights of others should in principle never arise.”86 In § 24 we saw that an individual’s (right to) freedom of movement may be very severely restricted by other people’s purchasing close to every piece of land around him — that is, up to the point at which he is entrapped so that the Lockeian proviso is triggered off. Still, almost entrapping someone thus doesn’t involve violating, or even coming near to violating, his right to freedom of movement: for, presuming all “holdings” are legitimate, those purchasing land act within their rights and, since no rights are in conflict, so do not violate any of his rights.87 Therefore, “Though the value of freedom of movement is sacrificed in part, the limited right to freedom of movement that emerges ... is not subject to violation for the sake of other rights.”88

§ 27: Importantly affecting the lives of others

If you are very rich and severely restrict my freedom of movement by legitimately acquiring nearly all of the land around me, your decision to get hold of those holdings importantly affect my life — perhaps on a daily basis even. Now, is it not fair that people have a right to a say in the decisions that importantly affect their lives? Surely not, Nozick holds:

Some ways of importantly affecting [people’s] lives violate their rights (rights of the sort Locke would admit) and hence are morally forbidden; for example, killing the person,

82 Waldron, “Rights in Conflict”, 504.
83 Ibid., 88.
84 Ibid., 166.
85 Cf. ibid., 88.
86 Cf. ibid., 19.
87 Waldron, “Rights in Conflict”, 504.
88 Pogge, Realizing Rawls, 19.
89 Ibid., 19.
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chopping off his arm. Other ways of importantly affecting the lives of others are within the rights of the affector. If four men propose marriage to a woman, her decision about whom, if any of them, to marry importantly affects each of the lives of those four persons, her own life, and the lives of any other persons wishing to marry one of these four men, and so on. Would anyone propose, even limiting the group to include only the primary parties, that all five persons vote to decide whom she shall marry? She has a right to decide what to do, and there is no right the other four have to say in the decisions which importantly affect their lives that is being ignored here. (208-269)\textsuperscript{89}

So, that others, acting within their rights, drastically shape your environment in the sense leaving you with far fewer options than you would like to have, gives you no right to a say in their doing so. Indeed, “After we exclude from consideration the decisions which others have a right to make, and the actions which would aggress against me, steal from me, and so on, and hence violate my (Lockean) rights, it is not clear that there are any decisions remaining about which even to raise the question of whether I have a right to a say in those that importantly affect me.” (270)

\section*{§ 28: Coercion, threats, and offers}

Importantly affecting my life through the application of coercion, though, is a different matter. Consider these two cases: A highwayman puts a gun at your head, shouting “Your money or your life!” Hoping that he will not take your life too, you hand over the money. In the novel Sophie's Choice, Sophie, a Jew, may choose, says the SS, which of her two children she’s to keep, otherwise both will be taken away and sent to the gas chambers. These cases, clearly, involve threats to others, and, says Nozick, “when a person does something because of threats, the will of another is operating or predominant” — whereas in the cases of someone’s doing something because of offers, “this is not so; ... a person who acts because of an offer is not subject to the will of another”\textsuperscript{90}

The essence of this view in “Coercion” appears in the much later Philosophical Explanations too, in the presentation of “the closest relative view” of coercion:

Writers on coercion have puzzled over why it is important whether another person intentionally directs your behavior in a certain direction. What is the difference, they wonder, between being kept inside a house by a lightning storm or by another person’s

\textsuperscript{89} Her “right to decide what to do” resides within her right to liberty, I take it.

\textsuperscript{90} Nozick, “Coercion”, 128.

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playing with electricity outside your house, or by another person’s threat to electrocute you if you leave the house. When the probabilities of electric shock are equal in the three situations, isn’t one equally coerced in all three? ...\textsuperscript{91}

Nozick’s answer to his own question is “no”: “In the lightning situation, your will keeps you indoors — no other’s motives and intentions are as closely connected to your act. Whereas in the threat situation, it is another person’s will that is operative. In the intermediate situation where another person acts but without intending to influence you to do act A, it is your intentions that are operating in your doing A.”\textsuperscript{92}

\section*{§ 29: Voluntary and non-voluntary consent (choice)}

My examples of threats in § 28 show the importance of a distinction between voluntary and non-voluntary consent. (I should be noted here that when speaking of a person’s consenting to X, Nozick understands a person’s voluntarily consenting to X throughout, though one will find that he sometimes prefers to speak of consent simply.\textsuperscript{93}) With the gun pointing at your head, you consent to let go of your money, but not voluntarily, we would say; Sophie consents to making the terrible choice (which so importantly affects her life that it destroys the quality of the rest of her life), but not voluntarily, we would also say. But whence, exactly, the non-voluntary nature of these choices? Couldn’t you have chosen to keep your money, to refuse to hand it over? Apart from the likelihood that then you would lose both your money and your life, and if so it wouldn’t be the rational thing to do (to put it mildly), surely you could have refused; “one can decide to resist a threat, one can weigh it and go against it.”\textsuperscript{94} (Perhaps your going against it in this case would discourage the attacker so as to make him retreat and leave you alone.) And surely Sophie could have chosen to let the SS take both her children instead of one. (But which mother would refrain from making the here “impossible” decision to have one child rather than no child?) Does this mean, then, that neither you in the highway situation nor Sophie act non-voluntarily

\textsuperscript{91} Nozick, Philosophical Explanations, 49.

\textsuperscript{92} Ibid.

\textsuperscript{93} Cf., for example, “Voluntary consent opens the border for crossings.” (58) and “the need for other persons’ consenting to cooperate and limit their own activities.” (95), respectively.

\textsuperscript{94} Nozick, Philosophical Explanations, 309. A cartoon goes like this: A highwayman shouts (the classical) “Your money or your life!” to a driver. The driver shows no signs of reaction; no money is being handed over. The highwayman is bewildered, and asks, “Well?”?, to which the driver answers calmly: “I’ve made my choice.”
whatever your choices turn out to be?

Nozick would say that in choosing, you both act non-voluntarily: “Whether a
person’s actions are voluntary depends on what it is that limits his alternatives. If
facts of nature do so, the actions are voluntary. (I may voluntarily walk to
someplace I would prefer to fly to unaided.) Other people’s actions place limits
on one’s available opportunities. Whether this makes one’s resulting action non-
voluntary depends upon whether these others had the right to act as they did.”
(262; italics mine) On the Nozickian conception of rights, the SS has no right to
kill other people and thus no right to put Sophie in a situation in which she must
consent or not to making a choice between two outcomes that both involve rights
violations. Nor may the highwayman “make you an offer you can’t refuse”.
So in neither case is the choice a voluntary choice (consent): “a person who does
something because of threats does not perform a fully voluntary action, ... he
does it unwillingly, ...” By contrast, “when someone does something because of
offers it is his own choice; ...”

On this view of voluntariness, if a person is faced with the choice of working
for some capitalist or other, or starving, he voluntarily chooses to work or to
starve. That is: this only holds true if the capitalist’s holdings are just. For only
then is the capitalist entitled to his holdings; he has a right to his holdings.

Now what Cohen is arguing against is Nozick’s moralized account of coercion.
That is, he rejects Nozick’s “view ... that coercion claims ... involve
moral judgments at their core.”, while himself preferring the view “that whether
one is coerced into doing something is an ordinary empirical question.”
And surely, descriptively speaking both Victor and William are equally forced to use
another route.

Apart from the claim that it is false, Wertheimer notes that some find
Nozick’s account of coercion “absurd. Michael Taylor [in Community, Anarchy,
and Liberty] writes that Nozick’s account ... is “an arbitrary and bizarre
stipulative definition.” After all, says Taylor, the “effects on the individuals’s
vision” [332], would Nozick say the more extensive state is not? If so, this latter state is both
unsatisfactory and legitimate “in the short run.”
choice conditions are the same whether the others act within their rights or not."" Comments Wertheimer: “Nozick’s view may be wrong, of course, but it is neither arbitrary nor bizarre. In effect, his view captures the theory of coercion that characterizes virtually the entire corpus of American law.”101 Anyway, whether we should opt for a moralized or nonmoral account of coercion is a question I shall not address here.

§ 31: Degrees of voluntariness, contracts, fraud, and “full information”

Feinberg holds that, “To whatever extent there is neurotic compulsion, misinformation, excitement or impetuosity, clouded judgment (as, e.g., from alcohol), or immature or defective faculties of reasoning, a choice falls short of perfect voluntariness.” Using the example of assuming a risk, he believes that, by contrast, risk is assumed “in a fully voluntary way when one shoulds it while informed of all relevant facts and contingencies, and in the absence of all coercive pressure or compulsion.”102

Nozick addresses the issue of degrees of voluntariness when he speaks of “someone’s being partially coerced, slightly coerced, almost fully coerced into doing something, and so forth.” However, he notes, to make real sense of such talk, one should be “able to assign weights to the parts of Q’s reasons for not doing A, which indicated what fraction of Q’s total reason for not doing A any given part was.” But “in the absence of precise weights” — though he briefly “indulge[s] in a bit of science fiction” as to what a formula for such weights might look like — we are, basically, left with the talk.103 (Try to imagine how to go about when giving weight to the “clouded” judgement of a particular person after he has consumed half a bottle of whisky, also giving weight to the fact that he’s less depressive today than yesterday, to the fact that he’s very excited because his plans for the evening include trying to seduce some woman, to the fact that he’s a neurotic philosopher, etc., so as to determine how short of perfect voluntariness his choice to have vanilla ice rather than chocolate ice for dessert falls.) Yet, if we do say that a person is partially coerced into doing some act, we might “be led to speak of a person’s being (held) partially responsible for his act;...

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101 ibid., 201.
102 Feinberg, Social Philosophy, 48; italics mine.
103 Nozick, “Coercion”, 135; italics mine.
104 ibid.; italics mine. The issue of responsibility, though, “would require another paper — were it not for the thought that some readers might take this as a threat.”, ibid.
105 —Still, it must be granted that were people’s reasons for transferring some of their holdings to others always irrational or arbitrary, we would find this disturbing.” (159) Cohen observes that, “Nozick does not say whether or not our finding a transaction ‘disturbing’ should affect our judgement of its justice.”;
“Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty”, 22, fn7. I think Nozick would say that it should not; we might also find it disturbing that people on irrational grounds commit suicide, permit others to kill them (cf. 58), arbitrarily either agree that others play Russian roulette on them (cf. 82) or enter irrevocable slave contracts (cf. 331), yet, as long as they do so voluntarily (noncoercively), the transactions satisfy “legality” — though certainly not many conceptions of “morality”, to put it in a Kantian language. It may be added that probably we would be quite disturbed even though people did these things for “rational” reasons. (A psychiatrist I know tells me that there is, in his field, such a thing as a category of “philosophical suicides”; that is, individuals who in a calm, apparently rational, way produce arguments as to why suicide is the right thing to do. These people, he also says, are, because they’re so convinced of the validity of their own arguments, very hard to stop from killing themselves. Perhaps psychiatrists could do with a little help from philosophers [who do not share the suicide candidate’s attitude] here?) (I discuss Nozick’s views on rationality in §53.)

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"enforcement of contracts,..." (ix)\textsuperscript{106} (I discuss Nozick's — and Kant's — concept of the state in Ch. IV.) Clearly, using force (coercion) against someone, or stealing from him, violates his rights; forcing him at gunpoint to get his money, making him donate his retina to you, and so on. But are any of his rights violated if he is being cheated in contract? If so, which are they? Unless Nozick can show that fraud involves rights violations, those cheating others do act within their rights and do not coerce these others — and hence the one being deceived acts voluntarily when signing (regardless of degree of [noncoerced] voluntariness). It is not clear then — though it perhaps can be made clear — why the minimal state should protect us against fraud.

To return to the cases of non-fraudulent mistake: what if I am mistaken about the consequences of a contract I have entered? It has been pointed out that, "I may consent to a transfer under one description of that transfer, but another description may also apply to it, and had I known that, I would not have consented."\textsuperscript{107} Onora O'Neill makes a similar point: "When we consent to another's proposals, we consent, even when "fully" informed, only to some specific formulation of what the other has in mind to do. We may remain ignorant of further, perhaps equally pertinent, accounts of what is proposed, including some to which we would not consent. ("I didn't know I was letting myself in for that!" we may protest.)"\textsuperscript{108} Or with Cohen: "Of each person who agrees to a transaction we may ask: would he have agreed to it had he known what its outcome would be? Since the answer may be negative, it is far from evident that transactional justice ... transmits justice to its results."

Before getting to a Nozickian answer to these questions, let me note the following: That I might not foresee particular consequences of my entering a contract is, I think, a problem that concerns almost all sorts of contracts. If I buy a house, even the most detailed contract — involving a lot of clauses — cannot rule out that I might later on discover some consequences of buying it that I didn't think of beforehand and therefore didn't include som words on in the explicit terms of the contract. I say that this holds true for "almost" all sorts of contracts since the following is at least conceivable: A contract may include the stipulation that it be rendered invalid should I have any complaints about the contract yielding consequences I didn't realize when signing the contract. Though conceivable, it wouldn't be much of a contract since I can always put forward some complaint — true or false — so as to nullify it whenever I like. In the normal case, therefore, a contract will stipulate particular complaints the reference to which will suffice for its invalidation; for example, a contract to buy a house will regularly include the clause that should the seller fail to inform me of some serious damage on the house, and have done what is "reasonable" effort to find out about the damage before signing, my detecting such a damage afterwards will give me a right to lift the contract.

Now, how would Nozick respond to the problem of someone's being mistaken about the consequences of a contract he has entered? The following imagined answer will, I think, capture the essence of his position: "Too bad for person A that he was mistaken. But this mistake is no less his own fault than is any other mistake of his involved in his signing the contract. Since A signed voluntarily, the contract is valid and will be enforced by the minimal state." Thus the reply is that a contract is binding whatever its consequences for the parties to the contract — as noted by Cohen, who writes that in Nozick, "certain freedoms, for example of contract, ought never to be infringed, whatever the consequences of allowing their exercise may be."\textsuperscript{110} (I discuss the issue of consequences more fully in § 32 below.)

Were the state to deem certain voluntary contracts invalid (voluntary slave contracts, say), and accordingly prohibit them, it would violate a person's freedom (liberty) of contract — which, to use my previous rights language, would be a "slice" of the person's right to liberty. And violating his right to liberty would equal violating one of his rights of self-ownership.

§ 32: Self-ownership: the thesis and the concept

Locke wrote that "every Man has a Property in his own Person. This no Body has any Right to but himself."\textsuperscript{111} The libertarian Murray Rothbard has written that, "each individual, as a natural fact, is the owner of himself, the ruler

\textsuperscript{106} A slightly different wording appears at 26: "protecting all its citizens against violence, theft, and fraud,..." O'Neill claims that Nozick's "definition [of the minimal state at p. 26] jumps the gun since the latter two protections presuppose property rights which are argued for in Part II of the book.; "Nozick's Entitlements", 322, n.3. But this is simply wrong: we have seen (§§ 7 and 19) that Nozick's Lockean LHL-P rights are stated as early as page 10. (Besides, property rights are hardly "argued for" in Nozick; rather, he just takes over the Lockean rights; cf § 19.)

\textsuperscript{107} Wolff, Robert Nozick, 86; italics mine.

\textsuperscript{108} O'Neill, "Between Consenting Adults", 108.


\textsuperscript{110} ibid., 30.

\textsuperscript{111} Locke, Second Treatise, sect. 27, 287.
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of his own person.”

But what does it mean to own oneself? For a start, it is useful to distinguish between the concept of self-ownership and the thesis of self-ownership: “the latter”, notes Cohen, “might be false, while the former, being a concept, cannot be false”, though it might be “incoherent, or inconsistent, or irredeemably vague, or irredeemably indeterminate.”

Now, “Persons and their powers can be controlled” and to the question, “who has the right to control [these]?” the “thesis of self-ownership says that the answer ... is: the person herself.” Thus the positions of Locke and Rothbard may be, I think, construed as defences of the thesis. I am not quite sure what Cohen means by saying that the thesis might be “false”, the way he presents it, it appears to be a normative thesis (cf. “who has the right to control”, etc.; italics mine) and so it seems more appropriate to say that it might be “wrong” — in which case the “correct” answer would be that the person herself ought not to be in control. That is more appropriate to say so is confirmed by something he says elsewhere: “According to the thesis of self-ownership, each person possesses over himself, as a matter of moral right, all those rights that a slaveholder has over a complete chattel slave as matter of legal right, and he is entitled, morally speaking, to dispose over himself in the way such a slaveholder is entitled, legally speaking, to dispose over his slave.”

In any case, Cohen (in 1995) says that, “I do not think that [the thesis of self-ownership] can be refuted.” As for the concept, he says that, “I am with Nozick ... on the issue of whether the very concept of self-ownership is coherent.”

Then what does the concept say? Some claim that it is incoherent or self-contradictory (as does Kant, we shall see in § 37). One argument goes like this: It presupposes that there is a “self” which owns itself. But how can something own itself, isn’t ownership a relational concept, isn’t what a self owns something else, an object “out there”? Others argue that this presupposed self is only presupposed and so the concept hinges on the notion of a dubious metaphysical or transcendental entity (like, perhaps, a Cartesian “Cogito”, or a Kantian transcendental ego, or a Ryleian real “ghost in the machine”). Need a defender of the concept of self-ownership swallow any og this; must he grant these critical remarks? Cohen states: “I do not myself believe, as some appear to do, that there exist selves, as opposed to persons, who shave themselves, criticize themselves, and (so some think) own themselves. ... To say that A enjoys ownership is just to say that A owns A: ‘self’, here, signifies a reflexive relation.” Indeed, he claims, “if ownership requires separability of what owns from what is owned, then self-ownership is impossible.”

Whether this is convincing I (or whatever “I” am) shall not discuss and shall thus adopt a “method of avoidance” (cf. § 50 below) towards the question of the concept’s intelligibility. As for the thesis, though, I do believe that it carries considerable conviction. If the state wants my left lung for transplant, and it intends to coerce me into giving it away, I would protest by saying “It’s my lung; others can’t just take it without my consent.” In protesting thus, I do not merely say that it’s against the law to forcibly remove my left lung, but I claim something stronger; namely, that morally speaking I own it — regardless of whether the law protects my bodily organs or not. And likewise in many other respects: “It’s my life”; “It’s my health”; “It’s my liberty”: noone would back those utterances by invoking, simply, “because the law says so”, I think. (And therefore I find Alan Ryan’s — unexplained — claim that, “the doctrine of self-ownership” contains a “rhetorical incoherence at its heart.” itself rhetorical only.)

§ 33: Rights as rights of self-ownership

In a recently published article, James W. Child summarizes his discussion of (what, on our previous analysis, is the thesis of) self-ownership thus: “Self-ownership ... means the exclusive right to manage and control one’s body, one’s own activities, one’s own plans and projects, and, thus, one’s own life. Along

112 Rothbard, Power and Market, 76. I shall say nothing here on the “natural fact” claim, nor on the fact that a person may be the ruler of his own person — his own master — without, necessarily, being the owner of himself. (For some remarks on this last point, see § 37 below.) The libertarian Jan Narveson thinks that Rothbard’s is a good statement of the “libertarian thesis”, The Libertarian Idea, 66.


114 Ibid., 210.


117 Cohen, “Self-Ownership: Delineating the Concept”, 211.
with it goes the powerful right to exclude others, that is, to not allow them management or control of oneself.” 121 And so, notes J. Wolff about the thesis, “only you have the right to decide what is to happen to your life, your liberty and your body, for they belong to no one but you.” 122

This suggests that self-ownership may be seen as “made up” by certain rights; that is, rights which are such that I can have them over myself. In Nozick, then, it is impossible to speak of “the rights which constitute ‘self-ownership’.” 123 But what does it mean that some rights “constitute”, or make up, self-ownership? It means that if one says so, one does “not conceive of ownership as having a thing, but as possessing rights (perhaps connected with a thing) which are theoretically separable.” (281) These are my Lockeian rights — separable, I argued in § 19, at the most general level into four (classes of) rights. (Thus the LHF-right.) A violation of each of these separable rights may be thought of like this: As for “life”: killing a person in order to spare the lives of several others — like in “killing some people early to use their bodies in order to provide material necessity to save the lives of those who otherwise would die young.” (206); as for “health”: removing an organ from his body against his will — an instance of “forceable redistribution of bodily organs” (“You’ve been sighted for all these years; now one — or even both — of your eyes is to be transplanted to others”), …” (206); 124 as for “liberty”: legal interference with his life style (presuming it is consistent with the rights of all) for paternalistic reasons — i.e., “to prohibit activities to people for their own good or protection.” (ix), perhaps by legislating against “fornication or sadism (on consenting masochist) …” (323); as for “possessions” (holdings): taxing his earnings from labour — which “is on a par with forced labor.” (169) for the sake of redistribution, which, “From the point of view of an entitlement theory, … is a serious matter indeed, involving, as it does,


122 Wolff, Robert Nozick, 7.

123 Kymlicka, Contemporary Political Philosophy, 105. Let me note that the thesis of self-ownership is not treated systematically by Nozick; here too is an instance of a (within the Nozickian position) very important view the reader must construct — or reconstruct — himself. It is telling that the thesis is addressed, more or less explicitly, only at 171-172, 226, 281-283, 286, and 290. (And if one looks for the word “self-ownership” in the book’s index one will look in vain.)

124 I here use “health” in the wider sense: Though the removal of one eye might not in itself cause a person’s health to deteriorate the way it will deteriorate if some company accidentally pollutes him with radioactive contamination from its nuclear plant, say, we wouldn’t hold the one-eyed person’s health to be equivalent to the two-eyed person’s health. This will be very clear, for instance, if they both apply for the Air Force’s fighter pilot’s academy: the one-eyed person will not even make it to the classroom because of (to a fighter pilot) serious lack in his health condition.

the violation of other people’s rights.” (168)

In Nozick, self-ownership is absolutely fundamental. Consider the selling of blood. Today I am legally free to sell my blood to others (and they can sell it further). But I am not legally free to sell to others my right to sell the blood in my body. However, on the Nozickian conception of rights, I would be. What is more, I may also “move up” one level and so sell the right to sell the right to sell the blood in my body, and even the higher-level right to sell the right to sell the blood in my body … and so on. 125 (Cp. also my discussion in § 67 of a person who alienates his future will by authorizing others to act towards him in the future upon his present will.) Besides, I can do anything with my blood — not just sell it to be used in transfusions or in research. (Perhaps I want to sell it to Devil worshippers for it to be used in their black masses, want to kill myself by giving it all away so that five others shall live, or whatever.) In being so extreme, one may well conclude that “Nozick is distinctive in the emphasis he puts upon rights of self-ownership.” 126 While one’s intuitions might be in favour of the thesis of self-ownership at the “lowest” level — I said in the last paragraph of § 32 that I believe that that thesis at this level carries considerable conviction (“it’s my lung”, etc.) — few will, I conjecture, follow Nozick’s radical, “all the way up” view as far as self-ownership is concerned.

In Locke, self-ownership is not equally fundamental. For example, Locke does not think that we own ourselves to the extent that we have the right to take our own lives (a view of Locke’s referred to by Nozick at 58). Now Locke puts forward what might be termed the “classical” statement of a thesis of self-ownership, we saw, namely, the statement that “every Man has a Property in his own Person. This no Body has any Right to but himself.” 127 But, remarks Lloyd Thomas, “It may be wondered how Locke can make this assertion when he also claims that we are the property of God.” 128 In § 47 below I point out that it is this religious metaphysics (as I call it) of Locke’s which explains why self-ownership in him is not as fundamental as in the Nozickian sense; why it is limited “at the bottom”. (I there also discuss Nozick’s rejection of Locke’s view.)

125 I owe this example of the current legal situation with regard to blood and how it would contrast with the Nozickian view to Thomas Pegge.

126 Wolff, Robert Nozick, 8.

127 Locke, Second Treatise, sect. 27, 287.

128 Lloyd Thomas, Locke on Government, 18.
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them over myself need not be conceived of as rights over myself (as rights of self-ownership). It is possible to defend rights similar (or sufficiently similar) to the LHP rights, yet not take these rights to be rights of self-ownership: I have these rights, yes, but they are not “mine” in the literal, ownership, sense of the word mine. I have a right to my lung, the law might say, but not because it is an “object” that I own, and so, while protected by law, I am not at liberty to sell my lung; such transactions might even be prohibited by law. Such a view could state that, because my rights are not owned by me, I may not dispose of them as I like, or at least not of all of them; in short, they, or at least some of them, are inalienable. (I discuss the inalienability vs. the alienability of rights in § 69 below, presenting Kant as a defender of the former view and Nozick as a defender of the latter.)

What both Locke and Nozick do, I should like to say, is that they add (what I shall call) the self-ownership view; this view is a way of interpreting the LHP rights — though not necessarily, then, the only way. Nozick adds one more (very important) view which I shall discuss in § 35; namely, the side-constraint view of rights. Thus, beside our previous perspectives employed to elucidate and understand the Nozickian conception of rights (the negative nature of rights, their being claim-rights in rem, how to “slice” them up, active and passive rights, and so on), we may look at this conception from a different perspective also; namely, as one involving three “levels” or “steps”. In this perspective, firstly there is the Lockean LHP rights themselves; secondly there is the self-ownership view (interpretation) of these rights; and thirdly there is the side-constraint view (interpretation) of the same rights. While it is, then, in principle, possible to have the LHP rights without the self-ownership view, equally it is possible to have the self-ownership view without the side-constraint view. A further possibility will then be to adopt the Lockean LHP rights with the side-constraint view but without the self-ownership view.

§ 34: Self-ownership and thing-ownership

There would seem to be a “hole” in the line of reasoning presented in the last section. It is this: how can a violation of someone’s property rights amount to a violation of his self-ownership; how can, for example, a tax on a person’s thing-ownership (holdings) “reach” (so as to violate) his self-ownership? Surely, the three first (classes of) rights concern myself in the proper sense; interfering with my life, health, and liberty means interfering with the “entity” I am. But the fourth type of rights concern, obviously, what is external to me (to my body). So

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how are “outer” things connected with the “inner” me? Put otherwise, if there is a relation here, what is it? If there is no relation, we must conclude that “possessions” do not belong under the heading of self-ownership; only three of my four classes of rights do. If so, the presentation in § 33 is not entirely correct — it has a hole in it.

Let us, first, go back to Locke in approaching this issue. After stating his thesis of self-ownership, he continues: “The Labour of [a man’s] Body, and the Work of his Hands, we may say, are properly his.” 129 Cohen puts this point elegantly: “if I am the moral owner of myself, and, therefore, of this right arm, then, while others are entitled, because of their self-ownership, to prevent it from being hit, no one is entitled, without my consent, to press it into their own or anybody else’s service, ...” 130 (Thus, “universal maximal self-ownership ensures that my right to use my fist as I please stops at the tip of your nose, ...”) 131 To Nozick, taxing a person’s earnings from labour is to so “press” his arm; it is like forcing the person to work n hours for another’s purpose. — it is, in short, “on a par with forced labor.” (169) And,

If people force you to do certain work ... for a certain time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a part-owner of you; it gives them a property right in you. Just as having such partial control and power of decision, by right, over an animal or inanimate object would be to have a property right in it. (172)

Here the relation between self-ownership and thing-ownership, and how a violation of the latter “brings down” the former, is quite clear: taxation is force, and forcing me to do something means taking control over my arm which I own. (It also means taking control over — i.e., violating — my liberty to use it as I please [short of violating the rights of others].) Therefore holdings gotten by me using my talents cannot be taxed at all without my self-ownership also being violated. To the extent that my earnings from labour are taxed for the purpose of fulfilling “end-state” or “most patterned principles of distributive justice”, to that extent my self-ownership is violated because such principles “institute (partial) ownership by others of people and their actions and labor. These principles involve a shift from the classical liberals’ notion of self-ownership to a notion of

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(partial) property rights in other people." (172)

Another way to put the Nozickian position at this point is in terms of positive and negative rights. Even the slightest degree of taxation in order to furnish people with positive rights, say, will institute partial ownership by others in the person taxed and thereby violate his negative right to what he has earned. But since people own themselves this is out of the question, for, "I do not (fully) own myself if I am required to give others (part of) what I earn by applying my powers." (312) "I do not own myself fully, if I am required, on pain of coercive penalty ... to transfer (part of) what I produce to anyone else, ..." (313) Thus the notion of self-ownership helps to show why positive and negative rights are like fire and water on the Nozickian conception of rights.

Not so in contemporary Western societies, where sometimes a negative right must to some degree give way to a positive right and sometimes vica versa. For example, that my negative right to property — i.e., my right that my property be protected, by the police, against theft, destruction, and confiscation — is not conceived of as always and everywhere unconditional is seen in the fact that if I own a piece of land, this piece of land may not be "entirely mine" due to property taxes. And income from property taxes constitutes, together with income from other taxes, an important section of the state's money pool that enables it to guarantee the positive rights of citizens; like, for instance, a right to means of subsistence. (314) This example also illustrates that a positive right need not be

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132 Ibid., 216.
134 For an individual to have a positive right like the right to means of subsistence, the state must, on Nozick's account, in order to realize such a right, forcibly collect funds for redistribution — i.e., it must engage in the violation of people's negative right to their holdings: "your being forced to contribute to another's welfare violates your rights, whereas someone else's not providing you with things you need greatly ... does not itself violate your rights, ..." (30) However, "We should note the interesting possibility that contemporary governments might make penalties (in addition to compensation) monetary, and use them to finance various government activities." (62, fn) One such "activity" may be the furnishing of means of subsistence for people who don't manage economically on their own. Also, I believe, it is imaginable that the state could obtain its resources through voluntary gifts. But as long as A's getting what he needs to live depends on B's giving him this (by what he gives being redistributed through the state's system of voluntary redistribution), one cannot speak of a "right" here; a right is something the state guarantees will be enforced, at least in principle, since enforcing it is what the state is for, but this it cannot do if B's gifts are lacking. Hence, "there are no guarantees". This reasoning does however hold true in the case of penalties as well. I think: if most people "stay clean" there will be nothing for which they must pay; and as long as very few penalties are being paid, the government lacks the money to cover the costs of its various activities — including activities of protecting negative rights. So now we have: A's getting what he needs to live depends upon B's committing crimes. There is also the further possibility "that the state could finance itself by running a lottery. But since it would have no right to forbid private entrepreneurs from doing the same, why think the state will have any more

Conditional or unconditional either: though there is a right to a minimum share of society's resources, noone has a right to anything he might claim he needs in order to have a life worth living. People with "champagne tastes" (Ronald Dworkin's phrase) have no right that the state supply them with Russian caviar and expensive French wines for breakfast, say — and if there were such a right, possibly people's negative right to property would have to give way completely since the state might need to confiscate all property in order to satisfy a (as the word is spread about the state's kindness) rapidly growing number of luxury maniacs (whom the state couldn't satisfy anyway; they will always come back for more, but the state's resources will always be scarce). In contemporary societies, then, on the Nozickian account, people do not own themselves but are owned by one another. For, "what is recognizable as a modern state" — i.e., as a more-than-minimal state — is a "system of demokrise, ownership of the people, by the people, and for the people", which is, "Indeed ... a democratic state." (290)

Now, in using my (self-owned) arm as I please (short of violating or threatening to violate the rights of others), I do employ my (self-owned) talents or natural assets. It might be said, then, that, "If I own my self, then I own my talents. And if I own my talents, then I own whatever I produce with my self-owned talents." (315) The last two sequences of this triadic relation is expressed in "the acceptable argument G:"

1. People are entitled to their natural assets.
2. If people are entitled to something, they are entitled to whatever flows from it (via specified types of processes).
3. People's holdings flow from their natural assets. Therefore,
4. People are entitled to their holdings.
5. If people are entitled to something, then they ought to have it (and this overrides any presumption of equality there may be about holdings). (225-226)

What I am able to get into my possession by using my talents (natural assets) is then considered as something flowing from my natural assets. Now recall (from footnote 87 of this chapter) that a legitimate holding is what I come to own either

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success in attracting customers in this than in any other competitive business?" (25, fn) Nozick's (minimalist) state, of course, is financed by its members paying for its protective services and thus enabling it to "pay for detectives, police to bring criminals into custody, courts, and prisons ..." (251) — even for the protection of those "free riders", or "independents", who refuse to pay for protection; see § 70 below.

135 Kymlicka, Contemporary Political Philosophy, 105.
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through original acquisition (“the appropriation of unheld things”), through transfer (“from one person to another”) (150), or through “the rectification of injustice in holdings.” (152)\textsuperscript{136} What I get through rectification, though, is not due to my using my natural assets; these are holdings the (nonpermanent) more-than-minimal state\textsuperscript{137} collects for me because I am entitled to these holdings. (Before this kind of state acted to rectify things, certain holdings of others were not legitimate holdings since they came into people’s possession through “past injustice (previous violations of the first two principles of justice in holdings) ...” [152].) However, gifts are things I haven’t used my talents to get hold of either. (At least not in the normal case; meaning there remains the possibility of my being particularly gifted when it comes to manipulating others into giving me gifts.) But gifts fall under the principle of transfer, and so there emerges the following conclusion: a state which taxes my gifts and my possessions that are due to (state) rectification will not, it seems, by Nozick’s own standards, violate my self-ownership. So here there appears to be no connection between thing-ownership and self-ownership, and so there seems to be a hole in the reasoning of § 33 after all — though a “smaller” one than first suspected.\textsuperscript{138}

Yet Nozick clearly holds that if the state states that others have, because of need or whatever, a legitimate claim on some portion (percentage) of my holdings — both those I have used my talents to get hold of and those I didn’t lift a finger to get hold of since they were given to me (through state rectification or as private gifts from other individuals, say) — the state in effect defends some patterned principle or other of distributive justice: “To think that the task of a theory of distributive justice is to fill in the blank in “to each according to his ____” is to be predisposed to search for a pattern; ...” (159-160) Now, "Patterned principles of distributive justice necessitate redistributive activities." (168)\textsuperscript{139} But, “From the point of view of an entitlement theory, redistribution is a serious matter indeed, involving, as it does, the violation of other people’s rights. (An exception is those takings that fall under the principle of the rectification of injustices.)” (168) Thus (so the parenthetical statement says) the state may redistribute in connection with rectification. My point, though, is that it looks as if it may also redistribute — through taxation — my rectified holdings, as well as my holdings stemming from gifts, without thereby violating my self-ownership. However, I shall no longer pursue issues concerning holdings in Nozick.\textsuperscript{140} Instead I shall direct attention to the side-constraint view — the view in which Kant plays a major role.

§ 35: Rights as Kantian side constraints: invoking Kant’s “Formula of Humanity as an End in Itself”

To the LHP-rights themselves Nozick adds the self-ownership view, I said. The final step of adding views is the application of the side-constraint view “on top of” the self-ownership view of rights. Now, “Side constraint” is Nozick’s term for the kind of agent-centred restriction he favours.\textsuperscript{141} On Scheffler’s general characterization of such restrictions, they are “restrictions on action which have the effect of denying that there is any non-agent-relative principle for ranking overall states of affairs such that it is always permissible to produce the best available state of affairs so construed.” Also, they “constitute the heart of most familiar deontological moral conceptions, ..."\textsuperscript{142} Thus it is clear that the side-constraint view implies a rejection of consequentialist theories, among

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\textsuperscript{136} As for rectification, Nozick realizes the shortcomings of his Entitlement Theory when it comes to grappling with this difficult issue — and suggests that the application of Rawls’ Difference Principle might, in certain cases, be the solution; “a rough rule of thumb for rectifying injustices might seem to be the following: organize society so as to maximize the position of whatever group ends up least well-off in the society.” (231)

\textsuperscript{137} On this state and its justification, see my remarks in footnote 97 of the present chapter.

\textsuperscript{138} Would it be possible to originally acquire something without using one’s (self-owned) talents so that if the state taxed this something of mine it wouldn’t be violating my self-ownership either? It might be thought that it is not possible for me to appropriate something unheld by just sitting down in my armchair, “doing nothing”. But what of my sitting in this chair ordering my consenting slaves who work for me to “mix their labour” (cf. 174-175) with unheld things; would that mean it was actually I who mixed my labour with these things, through the “instrument” of my employees (slaves)? Wouldn’t then be a very talented leader (master) if so, I do use my talents even though I don’t move at all — or so it seems.

\textsuperscript{139} The likelihood is small that any actual freely-arrived-at set of holdings fits a given pattern; and the likelihood is nil that it will continue to fit the pattern as people exchange and give.” (168) See Nozick’s famous Wilt Chamberlain example (160-164) for more information on the “nil” part of this claim about likelihoods.

\textsuperscript{140} The Entitlement Theory (of holdings) presumably is the part of Nozick’s libertarianism which has attracted most, and the most severe, criticisms. I, however, discuss it only at margins of the present work. But let me just point out that it isn’t even certain that there is an entitlement theory in Nozick: “We shall refer to the complicated truth about [the] topic [of the appropriation of unheld things], which we shall not formulate here, as the principle of justice in acquisition.” (150; italics mine) Comments Wolff: “And indeed it is not formulated anywhere else by Nozick either. And if it is not formulated, what is there to defend?” Robert Nozick, 106. (Connected to this topic is the crucial Leckean idea of “mixing one’s labour with” something unowned so that one comes to own it. We should notice that Nozick is so sceptical — and ironic — about this notion that it is far from clear that he accepts it himself, cf. his famous “tomato juice” example at 174-175.)

\textsuperscript{141} Scheffler, The Rejection of Consequentialism, 82, fn.1.

\textsuperscript{142} Ibid., 4.
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which utilitarianism is the most "famous". At one point, Nozick provides a radical interpretation of utilitarianism: "Maximizing the average utility allows a person to kill everyone else if that would make him ecstatic, and so happier than average." (41)

But a utilitarian position, broadly speaking, need not be one concerned with the classical issue of maximizing "happiness": it could be one concerned with the maximization of "the nonviolation of our rights". (28) A utilitarian defence of their nonviolation, Nozick points out, might be "something like a "utilitarianism of rights": violations of rights (to be minimized) merely would replace the total happiness as the relevant end state in the utilitarian structure." However, "This still would require us to violate someone's rights when doing so minimizes the total (weighted) amount of the violation of rights in the society." (28) In rejecting this view of what may happen to someone's rights — that is, to his LHLH-rights — Nozick proposes the alternative set forth by the side-constraint view:

In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don't violate constraints C. The rights of others determine the constraints upon your actions. (...) This view differs from one that tries to build the side constraints C into the goal G. The side-constraint view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society. (29)143

This, I shall claim, illustrates my construal of three levels of views with regard to the Nozickian conception of rights. The idea of "placing" rights as side constraints upon action shows that the side-constraint view is added in the way I suggest. Accordingly, the incorporating of rights into some end state to be achieved represents the adding or placing of another view; namely, the (alternative) "utilitarianism of rights" view. Now notice that this latter position is congruent with a position which adopts both the LHLH-rights and the self-ownership view. It might go something like this: "Yes, we do think that people have (the Lockean) rights, and also that these rights are rights of self-ownership. Nevertheless, we do not hold the view that (the Lockean) rights are to be conceived as side constraints that may not be violated; rather, their nonviolation

143 Nozick realizes, he says, that "an argument for a side-constraint structure that consists largely in arguing against an end-state maximization structure is inconclusive, for these alternatives are not exhaustive. (...) An array of structures must be precisely formulated and investigated; perhaps some novel structure then will seem most appropriate." (29, fn)

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is to be maximized and therefore they may be violated if necessary to lessen their total violation.

Such a position concerning rights, an end-state view on the Nozickian account, Nozick puts in terms of Kant's "Formula of Humanity as an End in Itself" (the Second Formula) of the Grundlegung, claiming that,

Had Kant held [such a] view, he would have given the second formula of the categorical imperative as, "So act as to minimize the use of humanity simply as a means," rather than the one he actually used: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end." (32)

The one Kant actually used captures, the way Nozick sees it, his side-constraint view of rights. And indeed, shortly after stating the Second Formula (at AA 429), Kant speaks of its violation in relation to human rights: "a transgressor of the rights of men [Rechte der Menschen] intends to make use of the persons of others merely as a means, without taking into consideration that, as rational beings, they should always be esteemed at the same time as ends. ..."144

As is well known, Kant's Second Formula has been subject to a lot of dispute as to its meaning. The Kant scholar Thomas E. Hill, Jr. notes that, "Few formulas in philosophy have been so widely accepted and variously interpreted as Kant's injunction to treat humanity as an end in itself." For example, it is sometimes understood as "a general reminder that "people count," ...,145 I argued in § 17 that Nozick deploys a significant dose of scepticism towards the view that people "count for something". If I am correct here, however, I do not think that that scepticism serves to undermine his use of the Second Formula as a centerpiece of the side-constraint view. One should not jump to the conclusion that the Nozickian theory is somehow inconsistent because of this, but, rather, see it as an example of Nozick's being sceptical towards the moral core (if I may say so) of one of his own philosophical devices. In any case, there seems to be general agreement that the formula raises certain difficulties for the interpreter, at least as far as the "positive" part of it is concerned: what is it to treat humanity as an end? — the "negative" part being that of never treating another simply as a means. Observes Robert Paul Wolff, "Everyone who reads [the Second Formula] must feel some sympathetic echo in himself, some sense that whatever the merits of

144 Kant, Grundlegung, 430/37.
145 Hill, "Humanity as an End in Itself", 38.
the Categorical Imperative, here at least Kant has touched the very heart of morality. And yet, upon reflection, I find it very difficult to tell what Kant means by the injunction to treat humanity as an end-in-itself, ..."146 Or with Cohen: "by contrast with the comparatively clear idea of not treating someone as a means, the idea of treating a person as an end is neither particularly clear nor well expressed by Kant."147

Bypassing all disputes about the meaning of the formula, it remains clear that in Nozick it is applied in the realm of legality — not in the realm of morality; cf. my discussion in § 10 above. The Nozickian realm of legality covers, we have said, the realm of my rights. And in the context of rights, as far as the Second Formula is concerned, it yields a ban only on "certain ways that persons may not use others; primarily, physically aggressing against them." Thus, "A specific side constraint upon action toward others expresses the fact that others may not be used in the specific ways the side constraint excludes. Side constraints express the inviolability of others, in the ways they specify." (32)148

Some writers see the invocation of the Second Formula as providing some sort of a foundation for the Nozickian rights:

A familiar example of a Lockean project with Kantian foundations can be found in Robert Nozick's writings on moral and political theory. Nozick's avowedly Lockean enterprise in Anarchy, State, and Utopia, insofar as it has explicit moral foundations at all, has straightforwardly Kantian ones. The "inviolability of the person" necessary for Nozick's view of rights as "side constraints" is derived directly from the second formulation of the categorical imperative (Anarchy, 32-33). ... [However,] it is not even remotely clear how a libertarian moral theory can be drawn without violence from Kantian foundations.149

Apart from the comment on the side-constraint view here, I think the rest of this interpretation is misguided. As I have shown, the side-constraint view is added as

146 Wolff, The Autonomy of Reason, 175.
148 In Philosophical Explanations, Nozick mentions Kant's Second Formula in relation to the idea of "moral responsiveness": "Treat someone (who is a value-seeking I) as a value-seeking I. This has kinship with Kant's principle: treat everyone as an end-in-himself and not merely as a means. What is it to treat someone as a value-seeking I? Suppose that in order to break a window I pick up a sleeping person and hurl him through it. I am treating him as an object. My behavior utilizes his mass, size, center of gravity, and other characteristics the physicist speaks of, but it is not due to his being a person, to his being a value-seeking I. ... When I hurl the sleeping person through the window, I take no account of the fact that he is a self, a subjectivity with desires: I treat him merely as a thing."; 462.
149 Simmons, The Lockean Theory of Rights, 43, In73.

far as rights are concerned; rights are thus not founded upon that particular view — Nozick's Kantianism concerning rights is not one which "comes first". Therefore it is clear that his libertarian theory is not drawn as indicated.

§ 36: How Kantian is the side-constraint view?

What I shall, for short, refer to as Nozick's "reflect statement" runs thus: "Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable." (30-31; italics mine) Notice the "consent" element here. The way I understand it, this element serves to emphasize another crucial part of Nozick's theory; namely, his "nonpaternalistic" position — which I discuss at length in the next chapter (III). This position allows a person to do to himself anything (cf. 58) and thus is also consistent with the self-ownership view according to which I may, for instance, sell shares in, or sell completely, my rights (cf. § 20 above). Both the nonpaternalistic position and the self-ownership view may then be taken to underpin Nozick's position that rights are alienable — a position I discuss in § 69 below. But then, as we shall see in the same section, Nozick's view of the overridingness of consent flies in the face of Kant's view that you may not consent to just anything. You may not, that is, alienate your rights — and hence Kant's position is that rights are inalienable. Therefore Kant would deny that consent suffices for you to be sacrificed, or for you to be used the way a slave (who has no rights but only duties) is used, say. So if one removes the consent element from Nozick's reflect statement, one gets Kant's position. There is some ground, therefore, for asking just how Kantian the side-constraint view is.

I thus find appropriate Cohen's analysis, upon which Nozick's reflect statement is depicted as including the following two, distinct, principles: "Kant's principle: Individuals are ends and not merely means. Nozick's consent principle: Individuals may not be sacrificed or used for the achieving of other ends without their consent."150 Having said that, I shall claim that Cohen's analysis of Nozick's reflect statement is inappropriate in another sense, to which I now turn.

§ 37: Kant on self-ownership, and a rejection of Cohen's interpretation of Nozick's Kantianism

In § 32 we noted that the concept (as opposed to the thesis) of self-ownership

might be thought to be incoherent. Cohen reports that Kant thought so in *Vorlesungen über Moralphilosophie* (AA volume 27), and then tries to turn Kant against Nozick:

Immanuel Kant ... argued that the would-be concept of self-ownership was an impossible concept, because self-contradictory. It is ironical that Kant made such an argument, in the light of Robert Nozick's view that Kant's prohibition against using a person merely as a means supports the principle of self-ownership. I show (...) that, contrary to what Nozick thinks, Kant's doctrine about means and ends does not support the principle of self-ownership, but I am with Nozick and against Kant on the issue of whether the very concept of self-ownership is coherent.151

First, let us look at Kant's position. Cohen goes on to argue why Kant's argument fails, its basic failure being that "Kant is trying to pull a normative rabbit out of a conceptual hat. For the ulterior purpose of his argument is to show that it is morally unacceptable for human beings to sell parts of themselves, engage in prostitution, etc. Kant's idea is that, since self-ownership is incoherent, acting as though one owned one's parts and powers is immoral."152 Now I shall not challenge Cohen's interpretation of Kant's position on the concept of self-ownership in *Vorlesungen über Moralphilosophie* — a work which is not of Kant's own making but derives from students' lecture notes — but grant that he is correct. Instead, I shall point to two of Kant's most important political writings in which he appears to defend a *thesis* of self-ownership.

In *Über den Gemeinspruch*, Kant writes: "no legal transaction on [a person's] part or on that of anyone else can make him cease to be his own master. He cannot become like a domestic animal to be employed in any chosen capacity ..."153 Now at this point in Nisbet's translation of Reiss' *Kant: Political Writings* there occurs a flaw. For the translation, "his own master" misses the notion of self-ownership altogether in Kant here. Compare with the original: "er kann durch keine rechtliche Tat (weder seine eigene noch die eines anderen) aufhören, Eigner seiner selbst zu sein, und in die Klasse des Hausviehs eintreten, das man zu allen Diensten braucht, wie man will, ..." The expression *Eigner seiner selbst* means, literally, "owner of himself", not "his own master" — a person who, according to the *Oxford Advanced Learner's Dictionary of Current English*, is "free and independent".154 That a person is his own master does not necessarily entail that the person owns himself. For example, we could say that in Western Europe people are denied (full) self-ownership through laws banning voluntary euthanasia.155 Yet we wouldn't say simply that therefore a person is not free and independent in any politically or normatively relevant sense of those words — though Nozick would say so, of course, and would hold that only when a person owns himself (fully) can we regard him as his own master; otherwise, the state is his part-owner and thus masters him. (Cf. § 34 above on Nozick's identification of modern, democratic states as systems of "demokesis"). In the case of voluntary euthanasia it masters him in the most basic sense with regard to his life.

In connection with Kant's violent attack on the paternalistic form of government — a *regimen paternale*, "the most despotic of all" — in the *Rechtslehre*, he launches an (antipaternalistic) thesis which easily lends itself to be interpreted as a thesis of self-ownership. Writes Kant: "Each is in possession of himself [sich selbst besitzt] and is not dependent upon the absolute will of another alongside him or above him."156 The German word *besitzt* means, literally, "to own" (cf. also *der Besitzer*, "the owner").

I am not sure how much mileage one can get here out of these statements on self-ownership in Kant. Certainly more research is needed to find out. But even should further research strengthen the view that not only did Kant hold the concept of self-ownership to be incoherent, but also that there really is no thesis of self-ownership in him either, the irony Cohen speaks of still wouldn't be there.

That is so because he misconstrues Nozick's reflect statement when interpreting it as if it has to do with self-ownership. In the quotation above he claims that Nozick thinks that Kant's Second Formula supports the principle of self-ownership. (The word "principle" in this connection is not explained.) But

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151 Cohen, "Self-Ownership: Delineating the Concept", 211.
152 Ibid., 212.
153 Kant, *Über den Gemeinspruch*, 293/76.
154 The entry on "master" at 531.
155 In the Netherlands, though (still) not legal, doctors' practice of carrying out voluntary euthanasia on patients is not subject to legal prosecution.
156 Kant, *Rechtslehre*, 317/128.
157 In connection with Cohen's criticism of Ronald Dworkin, "principle" appears to cover the meaning of "concept": "Some think that the concept of self-ownership is vitiated not by incoherence but by indeterminacy. Ronald Dworkin ... said that the principle of self-ownership is too indeterminate to pick out a distinct position in political philosophy."; "Self-Ownership: Delineating the Concept", 213. However, this conflicts with Cohen's use of "principle" in "Self-Ownership: Communism, and Equality: Against the Marxist Technological Fix", 116-117: "the principle of self-ownership ... says ... that every person is morally entitled to full private property in his own person and powers." Here, obviously, principle refers to the thesis.
that is not Nozick's position. In his reflect statement it is the side-constraint view which is taken to "reflect" Kant's Second Formula. It is when rights are understood as definite constraints on the goals to be pursued that Kant enters the picture. Thus there is no reference here to the LHP-qualities being rights of self-ownership — no reference, that is, to "level" two on my construal (but to level three). (Recall from § 33 that the self-ownership view does not entail the side-constraint view, nor vice versa.) There is, then, no textual basis for the claim that in employing his reflect statement, "Nozick thereby seeks to attach to self-ownership the prestige associated with the name of Kant."\textsuperscript{158} If, however, "the side-constraint view" is substituted for "self-ownership" in this sentence, we get the correct picture.\textsuperscript{159}

§ 38: Are there any absolute rights (side constraints)? On "catastrophic moral horror" in Nozick — and in Kant

"Side constraints express the inviolability of other persons." (32) Congruent with this statement is the reflect statement's last "part", which is that "Individuals are inviolable." (31) But are they, really? Now why ask this question; isn't it made quite clear by Nozick that one is, because of the side-constraint interpretation (or view) of rights, absolutely prohibited to violate someone's rights in the pursuit of some goal? Were one to defend the correctness of pursuing the end state "violations of rights to be minimized", say, one would, by implication, reject the absolute nature of rights (as specified by their side-constraint interpretation) and hence adopt a "utilitarianism of rights". Nozick's position, then, is an "absolutism of rights", I suggest. But the question is a relevant one, nonetheless. For in one much quoted, and much discussed, footnote Nozick admits that individuals might not be inviolable after all: "The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror ... is one I hope largely to avoid." (30, fn) In (a note of) a later work he says that, "In Anarchy, State, and Utopia, I elaborated a view treating side constraints upon action as exceptionless within a deductive structure, but with one cautionary footnote (p. 30) about possible exceptions in extreme situations."

Before going ahead with the remains of this section, I take the following preliminary remarks on the notion of an absolute right to be appropriate: If one holds that (some) rights are absolute, one need not hold also (so as to rule out) that an absolute right cannot be forfeited. Accordingly, one may hold, for example, that all persons have an absolute "right not to be killed except when the persons are not innocent, or except when such killing is directly required in order to prevent them from killing somebody else."\textsuperscript{161} I propose the following examples for illustration here: If a person is found guilty ("not innocent" in the juridical sense) of murdering someone the state is justified, some will hold, in executing the person.\textsuperscript{162} (For some speculations on whether Nozick would hold the death penalty to be legitimate, see footnote 24 of Ch. III below.) And if a heavily armed person takes hostages and threatens to execute them the state is justified, almost everyone will hold, in letting the police's SWAT team do their best to kill him. Also, your acting in self-defence nullifies an attacker's right not to be killed. In all of these cases the person in question has, due to his performing some wrongful, prohibited act, forfeited his absolute right not to be killed. The right not to be killed is thus limited in scope; it doesn't cover every situation. More tricky cases are those of killing innocent threats in self-defence (cf. 34-35 and my § 21 above). If you are an innocent threat to me, there is nothing you have done to become a threat to me, and so it doesn't make sense to say that you have (yourself) forfeited the right not to be killed (by me). Similarly with your being an innocent shield of threat to me. And further, if, being such a shield, (are able to) fight back in self-defence, "Do we get two persons fighting each other in self-defense?" (35), and, if so, none of us have done anything to the effect of forfeiting our absolute right not to be killed, yet we are both justified in trying to kill each other.

"A right is absolute", says Alan Gewirth, "when it cannot be overridden in


\textsuperscript{159} Will Kymlicka misconstrues Nozick's reflect statement very much along the same lines as does Cohen: "Nozick ... appeals to a principle of 'self-ownership', which he presents as an interpretation of the principle of treating people as 'ends in themselves'... which was Kant's formula for expressing our moral equality...", Contemporary Political Philosophy, 103.

\textsuperscript{160} Nozick, Philosophical Explanations, 734, n74; italics mine.

\textsuperscript{161} Gewirth, "Are There Any Absolute Rights?", 95.

\textsuperscript{162} Though found guilty in a court room, a person may still be objectively innocent — but unfortunately for the person in question, all ways if establishing that might be closed to him. That, clearly, is the situation of many poor, black Americans sitting in "Death Row": if they could afford the lawyers and private detectives O. J. Simpson had the money to buy, presumably many of them wouldn't be in that row. (Naturally, the verdict "not guilty" isn't necessarily a proof of the innocence of the accused either; he may still be objectively guilty.)
any circumstances, ..."163 Since Nozick grants the possibility of exceptions in extreme situations, in this sense of "absolute" there are no absolute rights in Nozick — rights could be "overridden to avoid some catastrophe." (180) Whereas Nozick in Anarchy, State, and Utopia not only hopes (he says) largely to avoid but also does largely avoid the issue of catastrophic moral horror, in the earlier "On the Randian Argument" there is a (very) long note in which he provides more information. There he says that he "ignore[s] questions about whether sometimes you are allowed to violate rights of innocents in order to prevent monstrous deeds by others.", but adds that, "Perhaps avoiding great moral horror swamps people's rights, so that one would be justified in doing something one knew would kill innocent people, in order to stop the horror."164 In connection with the discussion of whether one may kill innocent shields of threats in self-defence (cf. § 21 above), he remarks (in a parenthesis): "Some uses of force on people to get at an aggressor do not act upon innocent shields of threats; for example, an aggressor's innocent child who is tortured in order to get the aggressor to stop wasn't shielding the parent." (35) Though one doesn't here kill an innocent so as to violate his (negative) right to life, his right to his health is violated in an extreme way. And of course there is the risk of "accidentally" torturing him to death. (Furthermore, because he is illegitimately being kept in captivity, his right to liberty is violated too.)

Now philosophers, doing "arm chair philosophy", are good(?) at coming up with fanciful examples, and, in general, the more science-fiction like the example, the less its relevance for moral issues, I should like to say. What is the point in developing such examples, it might be wondered. It might also be wondered why philosophers don't look to the real world for examples. Surely there is no shortage of real examples with which to illustrate philosophical arguments and positions. Unfortunately Nozick's example of torturing the innocent child is far from far-fetched as compared to real scenarios, I shall hold. Consider the following: In the U.S. lately, there has occurred right-wing terrorism like the so-called "Oklahoma bombing" of a particular government building, an incident in which many, both grown ups and children, died. Clearly, one should not dare to underestimate what the fanatics behind the bombing are capable of doing — and neither does the FBI today; after months of surveillance of fellow fanatics of those behind the bomb in Oklahoma City, they recently discovered

large amounts of explosives and plans to use them on several pin-pointed targets in the U.S. Now suppose, not unrealistically at all, that the FBI acquires knowledge of similar plans only after the terrorists have taken off to perform their "monstrous deeds" (Nozick's expression), but are unable to find out where the bombings are scheduled to take place and so will not know which areas and buildings to evacuate. Suppose further that the only, or the most promising, way to try "to stop the horror" (Nozick's expression again) is to torturing one "aggressor's innocent child ... in order to get the aggressor to stop". (35) What would the authorities do?165 Let it be mentioned here that the Israeli national assembly is about to pass laws that make it legally permissible (but not mandatory) for police officers to torture suspects in order to try to stop the many so-called "bus bombings" and other terrorist attacks. Though the police will not be authorized to torture innocent people, no doubt they could end up doing so since a tortured suspect may of course prove, in the end, to be innocent. If the national assembly of a democracy can enact laws like that, how far is it from the enacting of laws that would make permissible the act in Nozick's awful example? Probably far indeed. Presumably (hopefully?) such laws will never be enacted in democratic societies. (In totalitarian societies I am sure one can find examples of laws permitting the police to torture children of political or religious dissidents in order to make them "confess" whatever it is they want them to confess; as we know all too well, such terrible, cowardly things are done in more than one place. As some totalitarian regimes have no scruples about torturing children of dissidents, certainly they will have no scruples about torturing the children of terrorists to try to stop them — even when terrorists threaten to do things short of causing catastrophic moral horror [presuming there could be a way of estimating what such horror amounts to].) But since the world as we know it today contains a most unfortunate mixture of many different terrorist groups and, possibly, not-hard-to-get-hold-of weapons (as well as other means) that could easily kill even millions of people (portable nuclear bombs, nuclear waste stemming from the former Soviet Union, chemical weapons and substances, viruses, etc.), perhaps one shouldn't feel too sure about what even democratic governments will

163 Gewirth, "Are There Any Absolute Rights?", 92.
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In any case, both in the philosophical world and in the real world there arises the question of what “catastrophic moral horror” amounts to and whether the threat of such a horror would justify doing unspeakably evil things to innocents in order to try to stop it. Whatever the answers to these questions might be, it is at least clear, as Judith Jarvis Thomson laconically remarks, that “Catastrophic moral horror is pretty horrible moral horror; ...” But, as Scheffler points out, “accounts of agent-centred restrictions in the literature are often incomplete, leaving open, for example, the question of when exactly the restrictions may be overridden to produce a good outcome or avoid a bad one.” He gives as an example the now famous, inconclusive, footnote of Nozick’s at 30. Nozick, in reference to same, apparently unbeknown to (or at least not mentioned by) Scheffler, points this out himself in a later work: “I imagined that teleological considerations would take over to avert “moral catastrophe”, but did not specify what determines where this transition takes place.”

In the early “On the Randian Argument”, Nozick admits that,

The possibility of “swamping” of rights may lead one to think that it is the goal structure, with a weighting of constraints inside the goals, which is appropriate, rather than the structure with absolute side constraints. But other structures are possible, e.g., a side-constraint structure with principles governing the setting aside of the whole structure. (But since many of the set aside structure’s features will have to reappear again in its replacement, is this the proper way to view things?) These issues ... are very complex, and I hope to discuss them in detail on another occasion.

In our time, this far one country has attacked another country (which it considered to be ruled by terrorists) in order to prevent the other country from being able to threaten it with nuclear disaster. I have in mind the Israeli preemptive air strike, several years ago, that took out an Iraqi nuclear plant (which in the opinion of Israeli intelligence was also doing research on the manufacturing of nuclear weaponry).


168 Scheffler, The Rejection of Consequentialism, 39. See § 35 above on Scheffler’s identification of Nozickian side constraints as agent-centred restrictions, as well as on his general characterization of agent-centred restrictions.

169 Nozick, Philosophical Explanations, 495. (Scheffler’s book was first published in 1982, Nozick’s in 1981.) By “teleological” Nozick understands a view which “views ethical action as directed toward the achievement of the (perhaps complex) good; an action (or the rules it follows) is to be judged by whether it serves to maximize the world’s goodness score.”; ibid., 494.

170 Nozick, “On the Randian Argument”, 224, n4. Amartya Sen, in opposition to Nozick’s side-constraint view, propounds what Nozick would call a utilitarianism of rights system, holding that one can make “so-called ‘constraints’ non-constraining under particular circumstances, though there is obviously a danger here of resorting to ad hoc solutions. (....) For example, it can be specified that if the badness of the state of affairs resulting from obeying the constraint exceeds some ‘threshold’, then the constraint may be overridden. Such a threshold-based ‘constraint’ system must rest ultimately on consequential analysis, comparing one set of consequences (badness resulting from obeying the constraint) with another (badness of violating the constraint itself, given the threshold), and its distinguishing feature will be the particular form of the consequence-evaluation function.” “Rights and Agency”, 199-201, fn8.

171 Nozick, Philosophical Explanations, 479. Italic mine. For Nozick’s idea of (moral) responsiveness, see ibid., 462-473. See also footnote 139 of the present chapter for information on how this idea is connected with Kant’s Second Formula.
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rights, like the right not to be tortured, will be passive negative rights, ....”

It would seem that there can be no doubt that the child’s right not to be tortured is here violated — or, as I said above, in the case of torture one’s right to one’s health is violated in an extreme way. Put otherwise: here we have a prima facie violation of a most basic right. However, there is a way of picturing things which will make the torturing appear as no right violation at all: One might say that your right not to be tortured doesn’t give way in the face of catastrophic moral horror; rather, since it never had the weight necessary to withstand the pressure from that kind of a situation your right not to be tortured never covered the situation to begin with. Hence there is no right of yours that is being violated.

Finally, in this section, we may notice that in Kant’s political philosophy too there is an interesting footnote in which he speaks of the state being threatened by “catastrophe”:

There is no casus necessitatis except where duties, i.e. an absolute duty [unbedingte Pflicht] and another which, however pressing, is nevertheless relative [bedingte Pflicht], come into conflict. For instance, it might be necessary for someone to betray someone else, even if their relationship were that of father and son, in order to preserve the state from catastrophe [Unglücks vom Staat]. This preservation of the state from evil is an absolute duty, while the preservation of the individual is merely a relative duty (i.e. it applies only if he is not guilty of a crime against the state). ... But it is an absolute duty not to take the life of another person who has not offended me and does not even make me risk my own life.173

What if, in such an emergency situation (casus necessitatis), the only way to avoid the catastrophe were to torture or kill an innocent individual, i.e., an individual “who has not offended me and does not even make me risk my own life” and who “is not guilty of a crime against the state”?174 At face value, of course, those actions are unavailable on the Kantian account. That notwithstanding, Hill notes that although in both the Grundlegung and the Tugendlehre Kant argues that suicide is wrong. “He does not ... draw the general conclusion that killing human beings is always wrong.” For example, he favours execution for murder (see also § 76 below), and, “Thus if Kant was consistent, he understood the incomparable value of humanity in persons in a sense that does not imply that the life of every person with humanity must always be preserved.”175 Furthermore, since, as we shall see in § 80, in Kant duties of justice trump duties of virtue, ought not Kant to allow the above mentioned actions when, obviously, the most important duty of justice is the duty to uphold the juridical state itself?

§ 39: The “irrationality” of the side-constraint view

Apart from the special case of catastrophic moral horror, it might be thought, as Nozick notes, that the side-constraint view is an “irrational” view:

Isn’t it irrational to accept a side constraint C, rather than a view that directs minimizing the violations of C? (The latter view treats C as a condition rather than a constraint.) If nonviolation of C is so important, shouldn’t that be the goal? How can a concern for the nonviolation of C lead to the refusal to violate C even when this would prevent other more extensive violations of C? What is the rationale for placing the nonviolation of rights as a side constraint upon action instead of including it solely as a goal of one’s actions? (30)176

Nozick forwards the reflect statement (as I have called it) as an answer to his own

172 Finnbog, Social Philosophy, 88; italics in original. Such a position, naturally, has problems of its own. Scheffler argues that, “In order to be an absolutist ... one must also hold that it would be impermissible to torture one child to death even if that were the only way to prevent, say, everyone else in the world’s being tortured to death.”; The Rejection of CONSEQUENTIALISM, 86, n.3. Though the general point is here clear enough, one would prefer a less implausible example than this one; that is, in being so unrealistic this example doesn’t serve very well to bring out the problems which haunt an absolutist’s position.

173 Kant, Über den Gemeinspruch, 300, fn/81, fn.

174 To attempt revolution, for instance, would indeed make one guilty of a crime against the state, for which one would face capital punishment: “it is in the highest degree wrong [im höchsten Grade unrichtig] if the subjects pursue their rights [sie Recht] in this way, and they cannot in the least complain of injustice if they are defeated in the ensuing conflict and subsequently have to endure the most severe penalties [die härteste Strafe].”; Kant, Zum ewigen Frieden, 382/126. 1 discuss Kant on revolution in §§ 81 and 82 below.

175 Hill, “Humanity as an End in Itself”, 51.

176 In reference to this statement, Scheffler says that, “there are some prima-facie difficulties with agent-centred restrictions. The main problem is the apparent air of irrationality surrounding the claim that some acts are so objectionable that one ought not to perform them even if this means that more equally weighty acts of the very same kind or other comparably objectionable events will ensue, ...”; The Rejection of CONSEQUENTIALISM, 82. And elsewhere: “If the violation of agent-relative constraints is morally so objectionable, it seems extremely odd, on the surface at least, for morality to tell us that we must not act in such a way as to minimize their occurrence.”; Scheffler, ‘Introduction’ to CONSEQUENTIALISM and Its Critics, 9.
questions; that is, he forwards a “Kantian” answer. Yet some find this answer rather unsatisfactory. Quoting Nozick’s reflect statement, Scheffler holds that, “It is natural to interpret this passage as a suggestion that violations of agent-centred restrictions involve violating the individuated individuals themselves, treating them as means instead of ends, and that since being violated or treated as a means is a bad thing, violations of such restrictions are impermissible.” But, “Appeals to the disvalue of violations of [restriction] R are powerless to explain why it is wrong to violate R when doing so will prevent five identical violations of R.”177 Nagel makes a similar point in relation to Nozick’s position: “the constraints on action represented by rights cannot be equivalent to an assignment of large disvalue to their violation, for that would make it permissible to violate such a right if by doing so one could prevent more numerous or more serious violations of the same right by others.”178

Scheffler concludes that Nozick’s defence of side constraints — that is, the reflect statement’s Kantian defence of side constraints — on his (Scheffler’s) “disvalue” interpretation of that defence, “is inadequate for the reasons just mentioned.” But, he adds: “if this is the proper interpretation of [Nozick’s] defence.”179 What alternative interpretations might there be; which others could there be? I shall suggest the following, competing interpretation: Whichever particular understanding one has of Kant’s Second Formula, one cannot but depict the formula as being concerned with the protection of humans, because a human being has “an intrinsic worth [Wert], i.e., dignity [Würde]” and is thus “above all price, and ... admits of no equivalent”.180 I.e., to say that the formula is not so concerned (in one way or another) would clearly be a statement devoid of meaning. But although it is crucial to Nozick’s side-constraint view, we have (in § 17) discovered that Nozick is sceptical towards claims to the effect that human beings “count for something”; that they have worth. What I’m getting at, is this. In view of Nozick’s scepticism in this respect one is not justified in drawing the conclusion that he does think that humans have worth (nor is one justified in drawing the opposite conclusion). It is not beyond doubt, then, that he would argue that treating someone as a mere means is disvaluable. Perhaps he would say simply that if one rejects the side-constraint view, one also rejects a

177 Scheffler, The Rejection of Consequentialism, 88; 87.
180 Kant, Grundlegung, 435, 434/40.

Kantian idea which has great appeal in most people and so most people would take disrespect for the idea (by way of treating someone as a mere means) to be a disvalue — although Nozick himself does not explicitly endorse the idea.

What is for sure, though, is that he thinks that both the side-constraint view and the end-state view, as represented by the “utilitarianism of rights” view, have intuitive appeal; he even speaks of “the powerful intuitive force of the end-state maximizing view”. (33)181 Nonetheless, perhaps it is true, as Scheffler believes it is, that “most would agree that [agent-relative moralities] mirror everyday moral thought much more closely than consequentialism does.”182 If so, Nozick’s formulation of this kind of moral thought is one of the strongest there is.

§ 40: Violation and compensation: taking back the side-constraint view?
All the more surprising is Nozick’s discussion in Chapter 4 (entitled, “Prohibition, Compensation, and Risk”) during which it is hard to see that he is not taking back a good deal of the strong formulation. For the position now, in fact, is that sometimes you may violate another’s rights (side constraints), provided that you compensate fully for your violation. (I return to the notion of “full compensation”.) Because of this, it has been claimed, “in the process of developing his argument in [Chapter 4] important unacknowledged shifts occur within Nozick’s conception of rights. Essentially this involves a shift from a fully deontic conception of rights ... to something approaching a utilitarian calculus.”183 This startling claim, we shall see, is not without its merits. Let us, to fix ideas here, first quote Nozick’s own understanding (in another work) of what a deontological view amounts to:

A deontological view ... specifies what it is right to do independently (at least partially) of the notion of the good. (I take this characterization from Rawls.) Thus, it places restrictions on what actions may be done (even to advance the good), and so it would classify as morally impermissible some acts that might, in the circumstances, best advance the world’s goodness score. These restrictions on the pursuit of the good will constitute side constraints if the deontological view includes exceptionless moral principles.184

181 Cp. Philosophical Explanations, 494: “Writers tend to plunk for one of these forms, deontological or teleological, and quickly “refute” the other, perhaps with the aid of a few artfully chosen examples. However, this procedure ignores the powerful and deep intuitive force of the rejected alternative, a force which is not merely to be explained away as the result of a simple mistake or illusion.”
184 Nozick, Philosophical Explanations, 494. Cp. The Nature of Rationality, 62, on “deontological constraints”: “By grouping actions together into a principle forbidding them — “do not murder” — an
The discussion of Chapter 4 is very complex. I find it easy to agree with Eric Mack that it is “by far the most difficult chapter of ... Anarchy, State, and Utopia”. “Accordingly,” he continues, “this central chapter has been almost entirely ignored by commentators friendly and hostile alike.”185 (Nagel notes that, “It is also the chapter with the greatest importance for legal theory.”186) Were I to treat it satisfactorily here I would soon be writing another dissertation than the one I’m already writing.187 Having said that, a work on the Nozickian conception of rights must discuss that crucial chapter to some extent in order to be a work on that conception at all. In what follows, then, I will try to extract what I take to be some of the main constituents of Nozick’s “violate first, compensate later” position and relate that position to my discussion.

Nozick starts like this:

A line (or hyper-plane) circumscribes an area in moral space around an individual. Locke holds that this line is determined by an individual’s natural rights, which limit the action of others. Non-Lockeans view other considerations as setting the position and contour of the line. In any case the following question arises: Are others forbidden to perform actions that transgress the boundary or encroach upon the circumscribed area, or are they permitted to perform such actions provided that they compensate the person whose boundary has been crossed? (57; italics in original)

We could say that the Lockeans thus mark off a “moral fence” no one must climb or cross in order not to invade another’s moral space; that is, in order to not violate his rights. This way of putting it seems appropriate since from this point onwards, Nozick frequently refers to rights violations as “boundary crossings” and as “border crossings”. (If however you consent to it, others may legitimately break down your entire moral fence; “Voluntary consent opens the border for crossings.” [58] For the importance of this position, see my extensive discussion in the next chapter [III].) Now, in view of the strong Kantian side-constraint formulation of rights it seems strange that Nozick should even raise the question in his italicized sentence (at 57). That is, it would seem plain that the

answer to that question is, “Of course others are forbidden to perform (not consented to) actions that transgress the boundary or encroach upon the circumscribed area. If others perform such actions they will fail to treat the individual as an end in himself.” Or, as R. P. Wolff puts it, Nozick “ought in all consistency to come to the conclusion that no unconsented-to boundary-crossings (i.e., rights violations) are permissible, regardless of compensation.”188 So why doesn’t Nozick come to that conclusion; what is the rationale for rejecting that, on the Nozickian conception, very natural conclusion? Wolff goes on to point out, correctly, I think, that this is so because Nozick “realizes ... that [it] is a crazy conclusion ... If accepted, it would immobilize us all, making us ... unable to lift a finger for fear of encroaching on one another’s moral space. So Nozick compromises.”189 In the section entitled, ‘Why not always prohibit?’, Nozick writes about the kind of fear Wolff has in mind here: “The penalization of all impingements not consented to, including accidental ones and those done unintentionally, would incorporate large amounts of risk and insecurity into people’s lives. People couldn’t be sure that despite the best of intentions they wouldn’t end up being punished for accidental happenings.” (71)

The word “including” in this quote indicates that Nozick’s compromise also concerns intentional, not consented to, rights violations. We shall soon see which these are. But in any event, the compromise cannot be understood but in relation to his theory of risk.

§ 41: Risks of rights violations, and conditions for permissible rights violations

If all activities that involve risks of rights violations were prohibited we would indeed be very immobilized, because “an enormous number of actions do increase risk to others, ...” (78) Think only of the driving of cars. Surely you put others in jeopardy when on the road with your car; surely you risk violating people’s right not to be killed and their right not to be harmed in their health when driving, and surely such violations will occur. But,

Actions that risk crossing another’s boundary pose serious problems for a natural-rights position. (...) Imposing how slight a probability of a harm that violates someone’s rights also violates his rights? ... a tradition which holds that stealing a penny or a pin from someone violates his rights ... does not select a threshold measure of harm as a lower
limit, in the case of harms certain to occur. It is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others. (74-75)

What then, is Nozick’s proposed solution to the problem; how does he go about to determine what is an “unacceptably” great risk to others? More specifically, what is his theory of risk?

“Clearly,” says Eric Von Magnus, “a major feature of the theory is that much of it consists of defining conditions under which rights may be violated.” For example, under what Von Magnus calls The Right of Efficient Rights Violations; that is, “when the following four conditions hold.”¹⁹⁰ (i) Compensability; (ii) Nonfear; (iii) Sale impractical; and, (iv) Fair Payment. The performance of not consented to rights violations when these four conditions hold is allowable, he continues, because the “resulting rights violations are Pareto efficient. In most cases, all parties will actually gain, as it turns out, so that we would expect the person whose rights was violated, without permission, to be glad this had happened.”¹⁹¹

One such rights violating act would, I guess, be my stealing your car (i.e., violating your property rights in it) when communication with you in order to get your permission to take the car is impossible or very costly, and I need it desperately to get my bleeding child to the hospital. It would be impossible to get your permission, for example, if you were already in that hospital, undergoing brain surgery. And if you were out of town and no one knew where in the world you stayed — or if you had to be found “in an African jungle” (72) — the task of finding you, if successful, could require the spending of huge amounts of money. (“If the task used the United States GNP, would it be “impossible” or extremely costly?”)²¹²] In this situation (iii) is satisfied thus: it is impossible, or requires high transaction costs, for me to purchase (for you to sell) the right to use your car in the emergency. And so I pay you afterwards; I compensate you fully. This could include getting you a new car in the same condition as the one you had because I wrecked it in the process (I was so exited and anxious about getting my child to the hospital that I didn’t notice the car parked in front of the hospital entrance and accordingly crashed into it), paying for the taxi that you needed in order to get to work the day you returned and discovered that your car was stolen.

¹⁹⁰ Von Magnus, “Risk, State, and Nozick”, 122; 123. What follows are “the headlines” only, not the full statement.

¹⁹¹ Von Magnus, “Risk, State, and Nozick”, 122-123.

etc. “The reason one sometimes would wish to allow boundary crossings with compensation (when prior identification of the victim or communication with him is impossible) is presumably the great benefits of the act; it is worthwhile, ought to be done, and can pay its way.” (72) (Notice how utilitarian sounding this argument is.) (ii) is satisfied since. “If I told that my automobile may be taken during the next month, and I will be compensated fully afterwards for the taking and for any inconvenience being without the car causes me, I do not spend the month nervous, apprehensive, and fearful.” (66-67) By contrast. “The actual phenomenon of fear of certain acts, even by those who know they will receive full compensation if the acts are done to them, shows why we prohibit them.” (69)²¹² Now, “full compensation” is so defined that it is a form of compensation which “keeps the victim on as high an indifference curve as he would occupy if the other person hadn’t crossed.” (63) Thus the act satisfies (i) too: it is compensable, i.e., there is a way of making you as least as well-off after the violation as you was before it took place. Bypassing the difficulties (mentioned by Nozick) in determining what compensation at a “fair” price is, presuming fair payment is forthcoming (iv) is also passed. Notice however that this requires that the would-be violator has the financial resources necessary for covering the fair price. In other words: in order to be a rights violator, he must be wealthy enough (“enough” in relation to the actual fair payment for the violation).

§ 42: Problems with the “violate first, compensate later” position

It would take us too far afield to try to assess the multitudinous questions and problems connected with the “violate first, compensate later” position. Let me however mention some: A problem would arise if your car was very old and unique — say the only of its kind left in the world — and you, being very sentimental, loved it very much for that particular reason. Then there presumably would be no way to fully compensate you for a possible loss of it. (Engaging experts to build you a replica were it to be wrecked would still be to get you a new car.) Hence, if told that your car may be taken you would also fear its being taken. Thus, it seems, neither (i), (ii), nor (iv), will be passed — and so I may not

²¹² Nonetheless, “There remains a puzzle about why fear attaches to certain acts. After all, if you know that you will be compensated fully for the actual effects of an act, so that you will be no worse off (in your own view) as a result of its having been done, then what is it that you are afraid of?” (69) Take the example, at 66, of someone coming up to a person, saying that he may break his arm in the next month, and that if he does he will give him $2,000 in compensation. Suppose that in order to eradicate the person’s fear “an arm-breaking machine was used in the task, to eliminate the question of overstepping the limits. What would a person given such guarantees fear?” (70)
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go ahead taking your car in the emergency situation.

Also, it would seem that in the very same situation, if I came up to you because you were actually at home and so I could communicate with you, desperate with my bleeding child in my arms, and asked for your permission to use your car (for money or for free), and you refused (“What is that child to me?”), I would have to look for other means of transportation to the hospital. If this is correct, and I suspected that you would refuse if asked this question, wouldn’t it encourage me to simply take the car, trying to get away with it in the courtroom afterwards by making the (false) claim that I couldn’t find you in that particular situation?

Now the example of an emergency is not Nozick’s; actually, he does not explicitly say that the “violate first, compensate later” position concerns situations of urgency. Yet the reference to boundary crossings, with compensation, that “ought to be done” (72) seems to lend itself to my emergency interpretation of the position; certainly one could say that my stealing your car in an emergency as described is an act which ought (morally) to be done. Notice that this is not, on the Nozickian account, tantamount to saying that the violation is excusable and therefore not wrong. Morally speaking, it might be the right thing to do (as most, I guess, would say it is). But from the legal point of view it is clearly wrong; after all, I do violate your property rights in your car. Which is why compensation for the violation is owing. But Nozick’s concern is also, we have seen, with efficiency; that is, with “the great benefits of the act” (72) of some rights violations. Having said that, he adds the important modification that, efficiency considerations are insufficient to justify unpunished boundary crossings for

193 Cp. Thomson, “Self-Defense and Rights”, 40-41: “Surely you do have a right that people will not break into your freezer and take a steak. If you had no such right, why would I have to compensate you later for having done so? … If all you had was a right that I not wrongfully or unjustly break into the freezer and take a steak, then I would have done nothing at all you have a right I not do; in which case, why would I owe you anything for what I did? … The fact that compensation is owing shows (and it seems to me, shows conclusively) that I did do something you had a right that I not do.” This also serves to explain, I think, why Nozick consistently employs the term “violation” of rights and never speaks of an “infringement” of a right. Thomson writes on the distinction: “Suppose that someone has a right that such and such shall not be the case. I shall say that we infringe a right of his if and only if we bring about that it is the case. I shall say that we violate a right of his if and only if both we bring about that it is the case and we act wrongly in doing so.”; “Some Ruminations on Rights”, 51. Thomson discusses a parallel example to my emergency example; namely, one in which we, unable to ask for your consent, break into your box with some life-saving drug in it, remove the drug, and feed it to a child who will otherwise die. “I take it”, she says, “that a child’s life being at stake, we do not act wrongly if we go ahead; that is, though we infringe a number of your rights, we violate none of them.”; ibid., 52. Nozick, then, would say that your rights are here being violated because others wrongly take your drug.

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marginal benefits, even if the compensation is more than full so that the benefits of the exchange do not redound solely to the boundary crosser … To say that such acts should be allowed if and only if their benefits are “great enough” is of little help in the absence of some social mechanism to decide this. The three considerations of fear, division of the benefits of exchange, and transaction costs delimit our area; but because we have not yet found a precise principle involving the last and the considerations mentioned earlier (p. 71), they do not yet triangulate a solution in all its detail. (73, italics mine)

So the permissibility of “violate first, compensate later” acts is confined to certain situations; but which these are is left undecided. In any case, it must be impossible to ask the person whose boundary is being crossed for permission to cross it.194

More generally, it might be wondered how intelligible the violation-compensation view really is. Notes Pogge: “Offhand this view must seem incomprehensible. If I am at liberty to do X without your consent provided I pay you compensation, then you have no right that I refrain from doing so, and hence my doing it crosses no border at all. … What am I paying you compensation for if no right violation (border crossing) is involved in the action?”195 Now Pogge suggests a way of understanding this difficulty which he thinks makes it disappear. I shall not discuss that suggestion, but try another route towards an answer to the question. Suppose one answered the following: “No, you have no right that another refrains from doing X with compensation — otherwise, you do have the right. Nonetheless, a border is crossed when X is being done; after all, something which is yours is taken from you. But your right gets ‘restored’ as compensation is being paid.” I am not sure, though, that this imagined answer is comprehensible either.

It might also be asked whether it is comprehensible to say that, “Voluntary consent opens the border for crossings.” (58); if I consent to your killing me, there is no border that you cross since my consent has already removed that border. To reuse my image (from § 40) of rights as constituting a “moral fence” around an individual, it doesn’t make sense to say that you may climb a fence which is no longer there. So how can someone possibly consent to having his

194 if the permissibility of boundary crossing acts were not confined to situations in which this was impossible, people could always take my holdings provided that they compensated me fully for it afterwards; everything I owned would be “up for grabs”, as it were. For a libertarian to hold that view would be strange indeed. (Some will think that Nozick’s violation-compensation position is strange enough as it stands.) Although such a system wouldn’t, presumably, create general fear, it may well create general annoyance; “Damn it! There goes my PC again!”

195 Pogge, Realizing Rawls, 19, fn6.
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rights violated? It would seem that no rights at all are being violated here.196

Putting aside all of the questions in this section, one might attempt a tentative, incomplete, and complex, summary of the “violate first, compensate later” position like this one:

If an action involving a rights violation would produce great benefit, and it is extremely costly or impossible to obtain in advance the consent of the rights holder, and there is no reason to suppose that the rights holder would refuse to consent (on appropriate terms) if approached, and the benefits of the exchange will be fairly divided, and a system allowing such violations would not create great fear, then rights violations should be permitted, provided compensation is paid.197

At the beginning of § 40 I said that Mack’s startling claim about Nozick, in his Chapter 4, approaching a utilitarian calculus as far as rights are concerned, is not without its merits. We can now see why and how. If by “utilitarian” we understand some policy or other that runs afoul of Kant’s Second Formula because it somehow fails to treat people as ends in themselves, the even more startling fact is that Nozick himself actually thinks that his “violate first, compensate later” position does amount to such a policy: “a system permitting boundary crossing, provided compensation is paid, embodies the use of persons as means; knowing they are being so used, and that their plans and expectations are liable to being thwarted arbitrarily, is a cost to people …” (71) Without investigating the matter any further, let me end this section by noting that, this rather un-Kantian feature of a violate-compensate system appears to sit uneasily with the strongly deontological, Kantian side-constraint view.

§ 43: Incompensable rights violations, “relaxing” side constraints, the principle of compensation, and “core” rights

In a note to the “great fear” condition in the quotation from J. Wolff above (i.e., the summary), he states that the consideration about fear is the reason why “violation of rights to life, person, and liberty will generally be prohibited and punished, even if compensation is offered.”198 That is, such violations will not pass our earlier (ii) Nonfear condition. As for life, nor will a violation pass (i) Compensability, for death is necessarily incompensable; and, “postmortem payment to relatives or favorite charities, … and so forth, all have obvious flaws insofar as the deceased is concerned, …” (77) (Therefore Wolff is not, strictly speaking, correct in his remark about compensation being offered for violation of the right to life: there is nothing to be offered as a compensation for that violation.) “It is questionable”, notes Von Magnus, “whether some bodily and emotional harms are compensable.”199 Here we can, I suggest, think of harms like losing both one’s legs or being raped — the latter harm also involving the violation of one’s right to liberty. In both cases it is rather obvious that all talk of compensation sounds hollow. (In the latter case, since empirical evidence suggests that most women that have been raped never recover from the trauma caused by the incident, and presumably no one ever “fully” recover from it, with such severe emotional harms being suffered — sometimes resulting in suicide and various self-destructive action [because women, like children having been abused, quite wrongly of course, tend to blame themselves for what happened] — it is very, very hard to imagine that some sort of comprehensive psychotherapy, say, could serve so as to compensate for the harm; indeed, how could any “offer” possibly “make it up” to the victims?) Thus neither losing both legs nor being raped passes (i) — or (ii). (Not to speak of (iv).)

But perhaps some minor bodily and emotional harms will pass the tests of (i), (ii), and (iv); if told that some day during the next month government officials will come to my house, forcibly collecting a tiny drop of blood from me because needed in an AIDS survey of the entire population, a survey in which everyone will be anonymous and can count on that, and that the method being used in the taking of the drop of blood guarantees that it will hurt no more than the bite of the smallest mosquito, and told that I will be fully compensated afterwards for the slight discomfort being inflicted on me (the reward being a $1,000 tax cut, say), wouldn’t all three conditions be satisfied? (The act is compensable, doesn’t create fear, and the payment is even more than fair.) (The fact that the act might not cause general fear doesn’t show that it will be unforested; some “irrational” souls might still fear its being done — like, presumably, with any act that passes (ii).) Notice that the above condition (iii) Sale impractical, doesn’t apply here: my consent to the rights violation (to force being used against me) can (easily) be obtained. Therefore the act does not fall under The Right of Efficient Rights

196 In reference to the position at 58. Von Magnus writes that, “Jones may sell (or give) to Smith the right to violate any of Jones’ rights that Jones chooses to void in this way.”; “Risk, State, and Nozick”, 122. But, again, how come Jones’ rights are here violated?
197 Wolff, Robert Nozick, 60. “This complex principle is, of course, incomplete, as we have no precise criteria for ‘great benefit’, ‘extreme cost’, ‘fair division’, and ‘great fear’. ”; ibid.
198 ibid., 147, n25.
199 Von Magnus, “Risk, State, and Nozick”, 123.
Violations as stated earlier.

Now there is some indication that Nozick seems prepared to allow the occasional inflicting of minor bodily and emotional harms even on nonconsenting innocents. Consider this passage: “Can’t one save 10,000 animals from excruciating suffering by inflicting some slight discomfort on a person who did not cause the animals’ suffering? One may feel the side constraint is not absolute when it is people who can be saved from excruciating suffering. So perhaps the side constraint also relaxes, though not as much, when animals’ suffering is at stake.” (41) How much the side constraint may relax in the case of saving people (or animals), or indeed whether the side constraint may relax at all — or what is meant by “relax” — Nozick doesn’t say. Recall that he doesn’t actually say that side constraints aren’t absolute should one face the possibility of catastrophic moral horror either. But I conjecture he wouldn’t even mention that case, nor the case of the 10,000 animals, if he weren’t willing to let side constraints relax on some occasions. But once he starts discussing on which occasions, why on these occasions and not on others, how much a side constraint may relax, whether some side constraints may relax more than others, etc., he’ll start moving farther and farther away from the strong Kantian side-constraint view. Thus it is understandable that he doesn’t discuss, nor takes a stand on, such topics. Whether his avoiding them is forgivable is another matter. In any case, here is a “black hole” in his conception of rights that many will complain about. And it is difficult to argue that they are not justified in so complaining.

All of this might be taken to account for the “generally” in Wolff’s statement (which he doesn’t explain): there might be some exceptions as far as harm to person and liberty is concerned, and for which compensation will (perhaps) be offered. (It is not clear whether Nozick thinks compensation would be owing in his “relaxes” example.) But whence the “generally” with regard to life? Would Nozick allow that you sometimes violate another’s incompensable (negative) right to life? The answer is “yes”. We can explain this answer with the aid of his “Principle of Compensation”.

The principle states that, “those who are disadvantaged by being forbidden to do actions that only might harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others.” (82-83) Now, why have such a principle at all, and what does it mean? (It should be remarked that Nozick doesn’t attempt “deriving the principle of compensation from deeper principles.” [87]) An answer to these questions might go like this: For a start, it is clear that too many important activities in our society impose nonnegligible risks. Consider again our previous example of the driving of cars. Should you be allowed to endanger the lives of others by driving your car? Why not prohibit all risky action that might kill another; “Why”, asks Nozick, “should some have to bear the costs of others’ freedom?” and answers that, to prohibit risky acts (because they are financially uncovered or because they are too risky) limits individuals’ freedom to act, even though the actions actually might involve no cost at all to anyone else. Any given epileptic, for example, might drive throughout his lifetime without thereby harming anyone. ... Prohibiting someone from driving in our automobile-dependent society, in order to reduce the risk to others, seriously disadvantages that person. It costs money to remedy these disadvantages — hiring a chauffeur or using taxis. (78-79)

Whereas driving in general poses a risk to other people’s lives, when the epileptic drives there is an extra risk involved; driving is especially risky when performed by him. So in order to reduce the risk to others, the epileptic is forbidden to drive, and compensated for the prohibition. (Here, I think, Nozick mainly relies on our intuitions telling us that both prohibition and compensation in this case are fair.) Someone being prohibited from playing involuntary Russian roulette on others[201], though, will not be compensated for the prohibition: “The idea is to focus on important activities done by almost all, though some do them more dangerously than others. Almost everyone drives a car, whereas playing Russian roulette or using an especially dangerous manufacturing process is not a normal part of almost everyone’s life.” (82) I ignore obvious difficulties with some of the notions employed here.

I said that Nozick would allow that you sometimes violate another’s incompensable (negative) right to life. That is not to say, of course, that you may

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200 A very wealthy epileptic might not be disadvantaged at all by a driving ban. If he happens to be an enormously rich member of the Kuwaiti delegates to the OPEC, say, he won’t even notice the extra money being spent on taxis, etc. And so we need not compensate him. This means the libertarian Nozick here has an argument in favour of poor people. His remark on the prohibition of financially uncovered, risky acts limiting individuals’ freedom to act (cf. 78) may also be interpreted as such an argument: the poor often cannot afford insurance because it is beyond their financial resources. (Or, just because they are poor, their priorities are such that they don’t spend any money on insurance. When things go wrong, then, those who need it most will receive nothing to cover their losses. Such is regularly the case with health insurance, for instance.)

201 Remark the word “involuntary” here; someone may voluntarily have another play Russian roulette on him. For more on this point, see my discussion of Nozick’s non paternalism in position § 47 below.

202 It is not clear that the “especially dangerous manufacturing process” of using plutonium in the production of electricity, say, would be allowed in a Nozickian society. If not, perhaps there would be no nuclear industry.
Natural Rights as Kantian “Side Constraints”

sometimes deliberately kill another. Rather, we have seen, you may engage in some activities that risk killing him—like driving your car; you may impose a “normal” risk of death like that on him. (Hence Nozick accepts what Von Magnus calls The Right to Impose Efficient Risks.203)

I shall now terminate my discussion of some of the issues discussed by Nozick in his Chapter 4204 — although I shall be returning to the principle of compensation in § 70 as Nozick applies it at a crucial stage in his derivation of the minimal state. In § 78 I shall also shortly address the notion of procedural rights; I have said nothing on it in the present chapter since on my judgement it is, for reasons that will become apparent, better addressed in connection with that section.

In ending this chapter on Nozick’s conception of rights, let me note the following: In § 7 of Ch. I I spoke of an individual’s “core” rights; i.e., rights which belong to the area others are totally forbidden to enter. On the core’s “outside” the next “layer” of rights encapsulates rights which you may violate first and compensate for later when prior consent is impossible to obtain; like my property rights in my car, for example. Therefore core rights (I also said) have a stringent rights/non-interference binary structure that non-core rights lack: my having them entails your absolute duty not to interfere with them. They are, one might say, Kantian side constraints proper. Which rights may be placed within the core? The following answer seems to suggest itself: rights having to do with one’s life, health, and liberty, all of which are really “close” to an individual.

Given the Kantian interpretation of rights, these would seem to be rights which may not be violated under any circumstances—save for instances of “catastrophic moral horror”, perhaps. But, apparently, this puts the point about the Nozickian position too strongly also. Among other things, we have seen, it is an open question whether, and how much, some core side constraints may “relax” in some situations. “Rights are not placed in a hierarchy of importance by Nozick”, notes J. Wolff.205 Not explicitly, no. But the sliding from absolute side constraints, via the possibility of relaxing some of them, to the violate-compensate position, suggests that there is at least an implicit hierarchy of rights. The mere fact that some are compensable whereas some are not suffices to show that this is so.

Anyway, the fully deontic conception of rights seems less so by the time one gets to Chapter 5 of Anarchy, State, and Utopia. I therefore find inappropriate the view that in Nozick, eventually “rights—at any rate, property rights—are infinitely stringent.”206 They are not.

§ 44: The issue of children’s rights

In this chapter on the Nozickian conception of rights I have ignored the complex issue of children’s rights. One reason for doing so—which is nonetheless no excuse for doing so—is the fact that Nozick’s libertarian treatise devotes very little space to discussing relations between parents and grown ups (who are not parents) and children—individuals who, because they belong to “the next generation”, have not yet “come of age”, as Nozick puts it (at 331). He mainly confines himself to, quite briefly, discussing parents’ rights over children (at 38-39 and 287-291)—not what rights children may have over themselves. I.e., he doesn’t address at all the question of children’s self-ownership. What is more, he doesn’t even say that he thinks children have rights. Instead he just “consider[es] Locke’s views on parental ownership of children.” (287) Yet one cannot infer from his discussion that he actually thinks children have no rights whatsoever; though sceptical towards Locke’s arguments designed to show why parents don’t own their children, Nozick seems, all in all, to be in agreement with Locke’s conclusion, saying there is no such ownership on the behalf of parents. Anyhow, one will not find any answers to questions like, “Do children have exactly the same rights as grown ups, and if, may they also do to themselves anything, etc., their parents being forbidden to interfere (as other grown ups are forbidden to interfere with the parents’ right to do to themselves anything, etc.)?”

In Philosophical Explanations, however, in the section on rights, we find the following remarks: “A person’s rights, we have said, are a function of how he ought to be treated, and how others ought to be treated with regard to their behavior toward him. It follows that there is a possibility that rights can be

204 One interesting issue I have not discussed, and shall not discuss, is the intelligibility of the principle of compensation itself. As Nozick notes: “It might be objected that either you have the right to forbid these people’s risky activities or you don’t. If you do, you needn’t compensate the people for doing to them what you have a right to do; and if you don’t, then rather than formulating a policy of compensating people for your unrightful forbidding, you ought simply to stop it.” (83) Though the principle may thus cause some puzzlement — it even looks as if there is no place for it — Nozick argues that the dilemma he himself points to “is too short.” (83)
205 Wolff, Robert Nozick, 66.
206 Thomson, “Some Ruminations on Rights”, 57. (Thomson does not discuss Nozick’s Chapter 4 in this article.) In a later work, however, Thomson seems to hold the opposite view; she now believes that Nozick would grant that side constraints “are more or less spongy”; The Realm of Rights, 134, n2.
transcended. It may be that at a certain level of someone’s development others ought to treat him in certain ways, yet at a higher level of his development others no longer ought to do so, for their previous behavior no longer would be responsive to his (now) most valuable characteristics. ... at this level of development certain treatments of him [are] no longer ... responsive to what he is like.”

We could, I believe, take this as some sort of an answer to the questions I posed; namely, that possibly children do not have full-scale rights.

III

Nonpaternalism, Self-Ownership, and Autonomy

“A paternalistic [government] (regimen paternale), ... is the most despotic of all (since it treats citizens as children).”

— Immanuel Kant, Rechtslehre

§ 45: What is this thing called paternalism?
The number of works on the topic of paternalism is so high that even to list them would require a lot of space. Here I shall be brief on the matter, concentrating upon Nozick’s understanding of paternalism and how that understanding relates to his conception of rights.

“By paternalism”, writes Gerald Dworkin, “I ... understand roughly the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.”¹ This general (or “rough”) understanding of paternalism fits Nozick’s definition of “paternalistic aggression” well: “using or threatening force for the benefit of the person against whom it is wielded.” (34; italics mine)² At the opening page Nozick also holds that, “the state may not use its coercive apparatus ... in order to prohibit activities to people for their own good or protection.” (ix) Here the understanding of paternalism parallels that of Derek

²⁰⁷ Nozick, Philosophical Explanations, 503-504.

¹ Dworkin, “Paternalism”, 65; italics mine.
² Nozick uses “force” and “coercion” interchangeably when speaking of paternalism, and so shall I.
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Partist, who says that, “We are paternalists when we make someone act in his own interests” this is done, for example, through paternalistic legislation: “The liberty-limiting principle called legal paternalism”, writes Feinberg, “justifies state coercion to protect individuals from self-inFLICTED harm, or, in its extreme version, to guide them, whether they like it or not, toward their own good.”⁴ On Nozick’s view, paternalistic legislation is “legislation which, in order to prevent him from coming to harm, or to lessen the chance of this, or to enable him to realize some good, makes someone unfree to perform a particular act.”⁵ Furthermore, Nozick defines a paternalistic arrangement in this way: “More precisely, the term [‘paternalistic’] applies to types of reasons for an arrangement, rather than to an arrangement itself. We might elliptically call an arrangement [‘paternalistic’] if its major (only possible) supporting reasons are themselves [paternalistic].” (27) Accordingly, if a state sets up an arrangement “in order to prohibit activities to people for their own good”, that will be the ground for calling it paternalistic — it “must be intended to benefit the interests solely of those whose freedom it restricts.”⁶

That an arrangement looks paternalistic doesn’t necessarily mean that it is, then; the reasons supporting it could be other than paternalistic reasons. For example, at first sight one might think that laws requiring motorcyclists to wear safety helmets are paternalistic; those who don’t use their heads to protect their heads from cracking in the event of an accident get them protected nonetheless — the state does the thinking for them in their own best interests. (Some will ask whether such heads really are *worth* their protection.) But that need not be so. Instead, the law’s justification could be something like this: The law’s intention

⁵ Nozick, “Coercion”, 126. “The reader might find it useful, in thinking about paternalism, to consider whether there are any limits to the severity of the penalty we would include in a paternalistic law, and how these limits are to be fixed. Could we, for example, have the death penalty for the offence of swimming at a beach when no lifeguard is present? Certain plausible-looking principles would allow this, because when the system including this penalty is instituted, it is the one of the alternatives which is expected to best operate for the person’s own good. Surely something has gone haywire here”; ibid., 126, fn26.
⁶ Miller, *The Blackwell Encyclopedia of Political Thought*, 368; italics mine. G. A. Cohen suggests that we “Call an action paternalist if it is performed for the sake of another’s benefit but against his will, and if it actually does benefit him as intended. A state that imposes a health insurance scheme on people all of whom benefit from it but some of whom are, for whatever reason, opposed to it acts paternalistically in the defined sense (…)”; “Self-Ownership, World-Ownership, and Equality”, 89. The extra, empirical condition of the act actually benefiting an individual is not found in the Nozickian position.

8 Were all medical treatments to be covered by private insurance schemes, say, there wouldn’t be any need for a law about safety helmets justified in this particular way. Within Nozick’s minimal state there wouldn’t since it doesn’t provide citizens with medical services; in no sense is it anything like a welfare state. (In “The Idea of Equality”, Bernard Williams claims that it is “a necessary truth” that “the proper ground for distribution of medical care is ill health”; 121. Nozick discusses this claim in some detail at 233-235, and in the course of the discussion he observes: “Presumably, then, the only proper criterion for the distribution of barbering services is barbering need. … Need a gardener allocate his services to those laws which need him most?” [234]).

9 A way not so consistent would be the following: In a particular situation the only way to prevent the “murders”, you reason, is to blow up the hunters’ vessels. Therefore in the middle of the night you board one of their ships. “Sea Shepherd” activist Paul Watson has ordered, and carried out, sabotage raids against Norwegian whaling vessels at quay in Northern Norway in this manner, in his crew are included former U.S. Navy SEAL Team commandos who know how to perform such acts.) You want to destroy the ship’s deadly harpoon with explosives you’re carrying. Unfortunately, in the course of your sabotage raid the grenade in the harpoon’s head (which is designed to kill the whale more efficiently) goes off together with your explosives, thereby killing you (and thereby securing your body a [dead] hero’s welcome as it is returned to your fellows) On the Nozickian conception of rights you may not act thus not because the state wants to protect you from killing yourself for the gain of animals, but because it wants to protect other people’s right to their holdings from being violated against their will.

7 Because damages from smoking cost society a lot too, some have suggested that the state not treat self-inflicted cancer due to smoking. Their argument is not that smoking is not for your own good; rather, what they’re saying is that if you’re willing to pay the price for smoking you ought literally to pay for your habits yourself.
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It might be thought that neither Nozick’s understanding of paternalism, nor Dworkin’s, nor Parfit’s, nor Feinberg’s, is wide enough, for the following reasons: It is not uncommon to try to justify paternalistic interference — here: the legal forcing of people — not only by reference to the welfare, etc. of the person one wants to coerce, but also by reference to the welfare, etc. of persons close to him. For instance, coercive action towards a drug addict to prevent him from taking drugs is said not only to be for the benefit of the drug addict himself, but also for the benefit of family members; taking charge of his life means one might “save” his marriage and his children as well by hindering the complete dissolution of family ties: Perhaps his wife is driven to desperation because of their tragic life situation and so is liable to start drinking heavily to comfort herself, and perhaps his children are liable to leave home and “get away from it all”, spending their time among “The Homeless”, unless the state acts to stop the husband and father from taking heroine. So now one acts like “a father” towards both the father and his family. Hence we, acting through the state’s apparatus, do not just make someone (the family father) act in his own interests, but also in the interests of others (the rest of the family).

This line of reasoning may be continued so as to “expand” the class of people whose welfare, etc. one wants to take care of when interfering with a particular person. The reference could be, for example, to the welfare, etc. of everyone else too: Perhaps the drug addict’s conduct is said to have a damaging effect on people’s lives in general because he sets an example that no one should follow if they are not to contradict their own best interests. Apart from what he does to himself and his family, then, what he does to “us all” is an additional reason for interference: interference with his conduct is justified by reasons referring to the welfare of the whole of the populace — the drug addict himself included. So now one “cares about” the total population; the class of persons at which paternalism is directed includes just everyone.

However, there are cases in which paternalism, says Dworkin, is directed at a class of persons in a way that also involves the restriction of the liberty of individuals not belonging to that class. “Thus in the case of professional licensing

An alternative course of permissible action would be this: If you’re at sea in your Zodiac boat and, to save the life of a particular whale, somehow manage to throw, or move, yourself in front of the harpoon as it travels towards the whale (don’t ask me how), and it kills you instead, that will be perfectly all right; a law prohibiting that would be paternalistic if its justification was the concern for the protection of your life. (Or will you thereby violate the huntsmen’s property right in the harpoon; will your post mortem compensation being paid to them be all right [you covering the cost of the harpoon — plus the calculated market price of the whale that escaped, perhaps]?)

11. Ibid., 68.
12. Ibid.
13. Ibid., 65.

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it is the practitioner who is directly interfered with and it is the would-be patient whose interests are presumably being served.”10 Such cases are cases of impure paternalism as opposed to the pure cases: “In the case of “impure” paternalism in trying to protect the welfare of a class of persons we find that the only way to do so will involve restricting the freedom of other persons besides those who are benefitted. … Paternalism then will always involve limitations on the liberty of some individuals in their own interests but it may also extend to interferences with the liberty of parties whose interests are not in question.”11 As an example of impure paternalism in this sense, I propose the following: One might argue that America’s “Doctor Death”, Jack Kevorkian, shouldn’t be allowed to manufacture and sell his suicide machine because it is not in people’s own interest that they have the opportunity to use this machine; their welfare is better served if they, in the event of facing certain, or “highly probable”, painful death, don’t have to take a stand on this frightening opportunity. What is more, with this machine around many more will fatally misjudge about their own best interests, some will add. So what Kevorkian might do to himself with his machine (if he uses it on himself) is of no concern here — thus the “impureness” of the prohibition; the protection of his life doesn’t enter the picture.

On the other hand, “In “pure” paternalism the class of persons whose freedom is restricted is identical with the class of persons whose benefit is intended to be promoted by such restrictions. [For example,] requiring a Christian Scientist to receive a blood transfusion.”12 — or forcing the junkie in my example into not being a junkie for no other sake than his own sake. Dworkin adds:

One is always well-advised to illustrate one’s definitions by examples but it is not easy to find “pure” examples of paternalistic interferences. For almost any piece of legislation is justified by several different kinds of reasons and even if historically a piece of legislation can be shown to have been introduced for purely paternalistic motives, it may be that advocates of the legislation with an anti-paternalistic outlook can find sufficient reasons justifying the legislation without appealing to the reasons which were originally adduced to support it. Thus, for example, it may be that the original legislation requiring motorcyclists to wear safety helmets was introduced for purely paternalistic reasons.13

In my example about safety helmets, by contrast, it’s the other way round: though
the original legislation requiring motorcyclists to wear safety helmets was introduced for purely financial reasons, it may be that advocates of the legislation with a paternalistic outlook can find sufficient reasons justifying the legislation from a paternalistic point of view.

§ 46: Paternalism, Kantian side constraints upon action, and coercion

On Nozick’s conception of rights, the junkie may go on having his heroin shots; forcing him to act otherwise for his own good — a case of “pure” paternalism on Dworkin’s construction — would be resorting to “paternalistic aggression” (34) simply and hence, because of the force element, violate his rights. On the same conception, what’s wrong with forcing the junkie for the good of others (wife, children, the whole populace) solely — a case of Dworkian “impure” paternalism — is that, “Using one ... for the benefit of others, uses him and benefits the others. Nothing more.” (33; italics mine) As long as individuals “may not ... used for the achieving of other ends without their consent” (31) — i.e., the junkie may consent to be forced — the involuntary forcing of a person not to do X to himself will run afoul of “Side constraints upon action [which] reflect the underlying Kantian principle that individuals are ends and not merely means; ...” (30-31) So whether the person is prohibited from doing X to himself (a) for his own good; (b) for the good of others; or (a) with (b) — a category not included in the Dworkian scheme — Nozick would reject all three of them on the basis of his conception of rights.

Now, “if we reject paternalism entirely,” Feinberg writes, “and deny that a person’s own good is ever a valid ground for coercion him, we seem to fly in the face both of common sense and long-established customs and laws. ... The state simply refuses to permit anyone to agree to his own disablement or killing. The law of contracts similarly refuses to recognize as valid contracts to sell oneself into slavery, or to become a mistress, or a second wife. ... The use of ... drugs, such as heroin, for mere pleasure is not permitted under any circumstances.”

14 Feinberg, Social Philosophy, 46. (The example here of signing a contract with a mistress is perplexing. Such a contract would be official and then one’s wife could find out about it! To be sure, my mistress wouldn’t dream of demanding a contract regulating her relationship with me as this would disclose the fact of here existence. Out of a concern for both my wife and my mistress — not to speak of myself — I’m not particularly keen on the idea of such a contract either. By the way: why think the prohibition of such a contract is for anyone’s own good? Why not, alternatively, hold that the permissability of such a contract could serve all three parties involved? One tends to think likewise in relation to the example of a second wife: if my wife could just send me away to my second wife when she can’t stand the sight of me, who says that all wouldn’t benefit?)

Nozick, we have seen, does reject paternalism entirely. A comment drawn from his “Coercion” also shows clearly that he, congruent with this (total) rejection, discards the legal ban on the use of narcotics:

Note that some paternalistic acts can involve great self-sacrifice, as when drugs are legally forbidden in order to protect those who are not addicts who would be so under a system in which drugs were legal. The price others pay to protect them is increased risk of being robbed or assaulted by addicts trying to acquire money in order to pay the high prices on the illegal market, plus the diversion of resources into trying to enforce the law. Perhaps it is appropriate that others should all suffer for their original unjustified paternalistic intervention.15

Dworkin holds that, “Laws making it illegal for women ... to work at certain types of jobs.” are paternalistic.16 Suppose the job in question is that of being a prostitute.17 On the Nozickian conception, prostitution will be allowed provided the prostitute is not coerced into selling sex. But isn’t prostitution often — if not always — a matter of a person being coerced, many will ask: are street prostitutes, say, really not coerced into doing what they do? Whether one wants to say that this or that situation involves coercion or not, one is in need of a theory of coercion in order to draw the line; for example, taking prostitution to be coercion per se means one draws such a line. In Nozick, the answer to the question, “Where to draw the line?” as far as coercion is concerned is a rather straightforward one: as we saw in § 29, provided all parties act within their rights, no one is coerced into doing anything of whatever it is that they choose to do and so they act voluntarily. (Recall that choices can be coerced and thus non-voluntary.) Hence, provided both “buyer” and “seller” of sex act within their rights, what’s taking place in the case of prostitution is not coercion — whatever else it may be (called). (It may be pointed out here that Cohen offers the following characterization of prostitution: in contradistinction to rape, “the violent borrowing of sexual organs”, prostitution qualifies as “the peaceful hiring

16 Dworkin, “Paternalism”, 65.
17 Regardless of what a particular country’s or state’s legislation happens to be on the legal status of that sort of a “job” — whether it, legally speaking, is considered a job or not — we may note that Paris prostitutes organize themselves in labour unions, demanding equal rights with other workers. Perhaps it’s not so far-fetched to describe what prostitutes do as “hard work” and “dirty work”, say, since they often work long hours and with people whom they detest. While it is sometimes said that “Politics is a dirty work, but somebody’s got to do it”, in the case of prostitution sex definitely sometimes is a dirty work — regardless of whether, and in what sense, somebody’s got to do it.
out of same”. 18 [It will be noted that certain forms of sexual services that
prostitutes perform make the hiring out rather violent, and so perhaps one better
speak of the voluntary hiring out ...]

If a person’s conduct violates or threatens the rights of others, interference is
justified in terms of preventing harm to others. Hence there is a significant
difference between the harmless drug addict who just walks around destroying
his own life and the drug addict walking around carrying a (big) knife with which
he threatens to destroy the lives of others as well by trying, under the influence of
hard narcotics, “to replace it between someone else’s ribs against their will ... ”
(282) This latter person we may lock up or detain in other ways. Likewise with a
“customer” who repeatedly mistreats and murders prostitutes against their will.
(Cf. Nozick’s position on preventive restraint at 142 and my discussion of it in §
14 above.)

§ 47: Nonpaternalism and antipaternalism

Libertarianism as conceived by Nozick is what he calls a “nonpaternalistic
position”. In one instance only does he use this label; when he implicitly tries to
“get rid of” Locke’s religious ballast in this way:

A person may choose to do himself, I shall suppose, the things that would impinge across
his boundaries when done without his consent by another. (Some of these things may be
impossible for him to do to himself.) Also, he may give another permission to do these
things to him (including things impossible for him to do to himself). Voluntary consent
opens the border for crossings. Locke, of course, would hold that there are things others
may not do to you by your permission; namely, these things you have no right to do to
yourself. Locke would hold that your giving your permission cannot make it morally
possible for another to kill you, because you have no right to commit suicide. My
nonpaternalistic position holds that someone may choose (or permit another) to do to
himself anything, unless he has acquired an obligation to some third party not to do or
allow it. (58; first italics mine)

I take this statement to constitute an implicit “dumping” of Locke’s religious
ballast for the following reason: Though Nozick doesn’t openly say he wants
nothing of Locke’s religious metaphysics here, that is exactly what he could be
said to be implying. For clearly Locke’s view, to which Nozick refers, has a
religious foundation. Life is given to us by God and so He is the one who owns
us in the fundamental sense, that fact being a (fundamental) constraint on what


we may do to ourselves. Self-ownership is thus limited “at the bottom” in Locke.
(Cf. my discussion in § 33 above.) Hence only God may take my life away; I may
not dispose of it: “For Men being all the Workmanship of one Omnipotent, and
infinitely wise Maker; All the Servants of one Sovereign Master, sent into the
World by his order and about his business, they are his Property, whose
Workmanship they are, made to last during his, not one anothers Pleasure.” 19 Just
as clearly as Locke’s view on what you (don’t) have a right to do to yourself
hinges on this religious understanding of our place in the world, just as clearly
Nozick needs to detach from this understanding if he is to avoid a paternalistic
position altogether. Alan Ryan speaks of “how very un-Lockean Nozick’s
conception of rights is just because it lacks the theological backing of Locke’s
theory of natural law and natural right.” 20 It is however an exaggeration to say
that this makes it very un-Lockean; a conception of rights which has the entire set
of Lockeian rights baked into it — although the conception rejects the foundation
of those rights — can hardly be characterized as very un-Lockean. A more
appropriate description of the conception, as far as the Lockeian sides are
concerned, is contained in the expression “Lockeanism without Lockeian
foundations”, I suggest.

In § 21 drew, but didn’t there explain, a distinction between a position that is
nonpaternalistic and one that is antipaternalistic. Wherein lies the difference, and
of what significance, if any, is it to Nozick’s political philosophy? First and
foremost, he rejects completely any type of imposed paternalism. Forcing others
to lead their lives “as immature children” [als unstandige Kinder], as Kant puts it,21 subject to some sort of a “father” that is in control of their lives — be it the
state, another individual, or a group of individuals — means denying people the
right to do to themselves anything, etc. (the constraint forbidding actions
jeopardizing og violating the rights of others being met). On a Kantian reading, it
also means one confuses morality and legality in being prepared to let the state
enforce (what one thinks is) a moral duty: “We will not allow you to do X to
yourself because you ought not to do X to yourself.” (Here we may want to
distinguish various intermediate positions: There may be certain things that I

19 Locke, Second Treatise, sect. 6, 271; italics mine. Being the one and only having that much property,
one might say with my colleague Henrik Syse that in Locke, “God is the greatest capitalist of all.” It is
worth noting here that the sentence immediately preceding these lines of sect. 6 states the (negative)
rights quoted by Nozick at 10. (One could say, then, that his quotation stops “just in time”.)

20 Ryan, “Review of Wolff”, 156.

21 Kant, Über den Gemeinspruch, 290/74.
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must not do to myself even though it would not be wrong for others not to interfere. It may even be perfectly all right for others to kill me on demand even though it would be quite wrong for me to make such a demand, etc.

A. John Simmons thinks that Nozick’s position should be labeled “strict antipaternalistic” rather than “nonpaternalistic”.22

That all persons possess certain natural (moral, human) rights that are inalienable is... a doctrine that has been as often questioned as it has been dramatically employed, even by those within the liberal camp who are broadly sympathetic to natural rights theories. Bentham, of course, was one liberal critic who lacked any such sympathy, regarding natural rights as “simple nonsense,” and the addition of adjectives like “impressible” or “inalienable” as merely placing “nonsense upon stilts” (Anarchical Fallacies, article 2). More recently, Nozick’s strict antipaternalism has included a blanket rejection of inalienable rights (Anarchy, 58), in spite of his acceptance of many Lockeian principles.23

One way to put Simmons’ point about Nozick is to say that if my rights were inalienable, they would function paternalistically against me: “You have to have rights, whether you like it or not.” The view that the stance on paternalism “transcends”, as it were, that on rights is due to the view that I own my rights and therefore may do as I like with them.

At first glance it might seem easy to agree with Simmons here — and thus to think of Nozick’s own label as inappropriate, or too feeble, or too vague to capture the real force of his criticism of paternalism. For, one might think, a political philosophy which argues for the legitimacy of the following acts clearly deserves the tag “strict antipaternalism”: You may sell yourself into slavery (cf. 331). You may have someone play Russian roulette on you (cf. 82, at which involuntary Russian roulette is rejected only; hence voluntary Russian roulette is all right). You may let another kill you with a knife — an example which is deducible in this way: “one’s property right in a knife does not include the right to replace it between someone else’s ribs against their will (unless in justified punishment for a crime, or self-defense, and so on).” (282; italics mine)24 So: if

22 Cp. Mack, who speaks of Nozick’s “antipaternalism” at page 187 of his “Nozick on Unproductivity: The Unintended Consequences”.

23 Simmons, On the Edge of Anarchy, 101, and ibid., 101, fn7; italics mine. As we see, Simmons refers to page 58 of Anarchy, State, and Utopia to back his argument, the single place, I noted in which Nozick speaks of his position as “nonpaternalistic”.

24 Cf. also 171: “My property rights in my knife allow me to leave it where I will, but not in your chest.” Remark the talk of “justified punishment for a crime” at 282; does this mean that Nozick would — as does indeed Kant — take the death penalty to be a legitimate penalty (a knife being used in the execution of convicted murderers)? New Kant holds, for example, that “every murderer — anyone who

commit murder, orders it, or is an accomplice in it — must suffer death; this is what justice, as the idea of judicial authority, wills in accordance with universal laws that are grounded in a priori,” (Rechtshafthe, 334/145). (Cf. also my discussion in § 76 below.) The model of punishment underlying this view is parallel to Nozick’s model of retribution: “if two persons each cooperate in murdering a third, then each assassin or murderer may be punished fully. Each may receive the same punishment as someone acting alone, n years say. They need not each be given m/2. Responsibility is not a bucket in which less remains when some is appropriated out; there is not a fixed amount of punishment or responsibility which one uses up so that none is left over for the other.” (130) (On the very same model, apparently, the state of Texas in 1993 executed two people who cooperated in murdering another: a husband and a bit man whom the former hired to kill his wife. Since an individual may be punished for persuading another responsible individual to do something.” (130), this view of retribution entails that quite many could receive the same penalty; there could, for example, be many executions as an “answer” to a single murder. Now a lot here turns on the topic of what “punishing” amounts to, and this again relates to the topic of possible constitutional limits on free speech (cf. 342, 366). For some remarks on these topics, see my discussion in § 25 above. (We may notice that Nozick doesn’t explain to us what is here meant by a “responsible” individual; perhaps he thinks the question of responsibility must be left to the court to decide upon in each instance? Notice also that his Philosophical Explanations contains a discussion of retributive punishment in ch. 4, Pr. III. Finally, it should be noted that Nozick’s retributive punishment view is consistent with the self-ownership view. Or with Cohen [who doesn’t explicitly address the Nozickian position here]: “consistent with universal self-ownership are harms associated with legitimate punishment and self-defense. But they are legitimate in virtue of aggrieve’s and criminals’ forfeiture of self-ownership rights.”; “Self-Ownership: Delineating the Concept”, 477, fn40.)

25 Nozick’s position here is especially well-suited for Devil worshippers voluntarily participating in “Black Masses” in which they sacrifice themselves to the Devil. It is also well suited for a Dane who asked his comrades to best him to death because life, he thought, was unbearably dull. They didn’t let him down — though in so doing they obviously couldn’t avoid knocking him down. (With friends like that, who needs enemies?)

26 Waldron, Introduction to Theories of Rights, 9.

27 In footnote 32 of Ch. IV, I point out that because the libertarian minimal state is better conceived of
way of an individual’s right to do to himself anything, etc., a state of affairs unacceptable to Nozick, of course. Accordingly, to be consistent concerning the topic of paternalism — to be able to stand by his anything-formula (as I shall call it) — Nozick cannot adopt an antipaternalistic position. Only by settling for a nonpaternalistic position can he be consistent.

We might bring out the anti-/non-distinction more sharply through an analogy with the side-constraints view vs. a utilitarianism of rights view (cf. § 35 above): Just as Nozick doesn’t allow rights violations even where such would be necessary to minimize rights violations overall, he doesn’t allow paternalistic interferences even where such would be necessary to minimize paternalistic interferences overall. 28

§ 48: The legitimacy of self-imposed paternalism

Provided paternalism is self-imposed, then, it is perfectly legitimate because anchored in the anything-formula. Therefore Nozick is able to say that, “persons who want to be paternalistically regulated [may contract] into particular limitations on their own behavior or appointing a given paternalistic supervisory board over themselves.” (14) This strongly suggests that the position places itself beyond the very question, “is paternalism right or wrong from a moral point of view?” What the position does state is that individuals must be left to choose for themselves whether to lead their lives subject to specific paternalistic arrangements or not. Paternalism may be wrong seen through the glasses of a certain morality (though Nozick never says so). However, as regards the sphere of legality — i.e., the sphere of rights — paternalism is condemnable if and only if it is forced upon someone since then it violates that someone’s right not to be coerced.

Yet another illustration, one may add, of the fundamental divide between morality and legality in Nozick.

§ 49: On the saying: “People are the best judges of their own interests”

A saying heard often in Western liberal democracies is the saying that people are the best judges of their own interests. That “argument” is employed to underpin views on individual rights, individual autonomy, individual freedom,

and not least on paternalism: “Paternalism runs against the main currents of liberal thinking, for typically liberals insist that each person is the best judge of his or her own welfare.” 29 Underlying the saying is a conception of ourselves as free agents — a conception which might be put thus: “A familiar figure (not a specter at all) haunts modern society. We’ve never actually met him, but we all know him. This elusive figure is the free agent, bound only by his own choices. He chooses a career, a spouse, a religion, a lifestyle, and more. He animates our moral and political arguments, our very idea of what a person is, and our social lives. A figure at once profound and banal, he poses a host of intriguing puzzles.” 30

In his consistent rejection of imposed paternalism, Nozick never claims that the reason for standing up for his view is that people actually are “the best judges of their own interests”, and that this (alleged) fact is sufficient ground for letting people choose the way of life they please; that they therefore ought to have this freedom. 31 (So that they can say with Frank Sinatra: “I did it my way” — without paternalistic intervention on behalf of the state or other individuals.) More precisely: Nozick does not claim that people actually “are independent and rational beings, who are the sole generators of their own wants and preferences, and the best judges of their own interests ...” 32 And we may ask someone claiming that as regards the last part of the claim: How would we know it is true that people are the best judges of their own interests; how would one have to go about to assess the truth or falsity of that statement?

Let us, however, for the sake of argument, assume it is true. It then appears to follow that nobody else than a particular person can have the correct knowledge of his own interests: other people are in principle denied direct access to this sort of information since any particular person is said to be the one possessing it “from within”. (That, naturally, is why he is said to be the best judge of his own interests; other people’s judgements concerning his interests aren’t comparably that good.) He might go on to tell others about what his real interests are, of course, thus providing “outsiders” with an indirect route to the information. But this doesn’t mean others are in a position to know: for one thing, he could be

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28 I owe this point to Thomas Pogge.

29 Miller, The Blackwell Encyclopaedia of Political Thought, 368.

30 Herzog, Happy Slaves, ix.

31 An argument that would probably be an illegitimate deduction of an “ought” from an “is” anyway.

32 Lukes, Individualism, 79. Lukes doesn’t attribute to Nozick these views. Nor are these views Lukes’ own; rather, they are just some views (among others) he refers to in his discussion in ibid., 79-87.
lying, but more fundamental is the (claimed) fact that he has exclusive, direct access to the truth about his own interests. Therefore others cannot "check" whether his interpretation, insight, introspection, or whatever we may call it, is correct. Accordingly, they are not in a position to know for sure. (And "who would call that knowing?") But even granting this sort of knowledge is personal, can a particular person be sure he has got it right? How would he know that he knows, and so on — ad infinitum.

At this point one could go on assuming, for the sake of argument, that not only is it true that people are the best judges of their own interests (i.e., the above assumption), but also, to battle the infinite regress before us, that a person in a particular situation can be in a position to know his own interests. Or one may make a move in the direction of trying to sort out the actual content of the best-judges doctrine and thus demonstrate why it is true.

§ 50: Why political philosophy may be “political not metaphorical”: in defence of a method of avoidance

A political philosopher may legitimately discard the latter strategy by submitting to (what, following Rawls, I shall call) a “method of avoidance” with regard to the question of whether the best-judges doctrine is true or false, for these reasons: The doctrine raises many metaphysical and epistemological questions — concerning the identity of the self, what an “I” is (cf., for instance, the problems with Descartes’ Cogito), the issue of free will, what counts as knowledge, be it objective or personal (subjective) knowledge, etc. — that should be dealt with outside the field of political philosophy. The way I see it, political philosophy need not take sides on certain central philosophical issues within metaphysics and epistemology, as if it would have to be decided in advance which metaphysical and epistemological positions are the correct ones for a political philosophy. Firstly, it is extremely unlikely that these branches of philosophy will ever provide “knockdown” or Letztbegründung arguments so as to settle their most hotly debated matters once and for all.33 Secondly, even

33 On so-called “knockdown” arguing, Nozick remarks in Philosophical Explanations: “The terminology of philosophical art is coercive: arguments are powerful and best when they are knockdown, arguments force you to a conclusion, if you believe the premises you have to or must believe the conclusion. . . . A philosophical argument is an attempt to get someone to believe something, whether he wants to believe it or not. A successful philosophical argument, a strong argument, forces someone to a belief. . . . Perhaps philosophers need arguments so powerful they set up reverberations in the brain: if the person refuses to accept the conclusion, he dies. How’s that for a powerful argument?”. 4. And “Why are philosophers intent on forcing others to believe things? Is that a nice way to behave toward someone? I think we cannot improve people that way — the means frustrate the end. . . . So don’t look here for a

assuming I am wrong in thinking such arguments will not see the light of day (some day), one couldn’t do political philosophy until they come around if one thinks political philosophy can’t get started without prior resolution of certain central metaphysical and epistemological questions: one would have to just sit down and wait for the answers, or engage in metaphysics and epistemology in order to help bring them about.

An alternative strategy, I said, is to simply adopt some positions within metaphysics and epistemology and then get on with it. Many philosophers have ended up doing just that, even though they have tried (hard) to ground their positions here. Others did not bother to try to ground positions that to them seemed so obvious. It is not unreasonable to hold that both Hobbes and Kant, say, failed to ground metaphysical and epistemological views which they thought to be of great importance to their political philosophies. (Perhaps Hobbes is one of those who took his views here to be so self-evidently true that he wouldn’t call them “views” at all since such language suggests that what one says could be wrong.) Yet this does not cause us to lose interest in what they otherwise say. For instance, Hobbes’ controversial materialism and determinism may be seen separately from the fact that we find much of his philosophizing interesting in many a way.34 And Kant’s much disputed postulate of “transcendental freedom”, a truly opposite position to that of Hobbes35, does not make him a less

knockdown argument that there is something wrong with knockdown arguments, for the knockdown argument to end all knockdown arguing.”; ibid., 5. I discuss aspects of the idea of a philosophical Letztbegründung in my “What Philosophers Can’t Do: Boundaries of Apel’s Transcendental-Pragmatic Philosophy”.

34 Hobbes’ materialistic metaphysics is expressed like this, for instance: “such a liberty as is free from necessity, is not to be found in the will either of men or beasts”., De Corpore, ch. XXV, 409. Though Hobbes rejects the notion of free will, he nonetheless thinks that we can still speak of freedom in the following sense: “A Free-Man, is he, that in those things, which by his strength and wit he is able to do, is not hindered to do what he has a will to.”, Leviathan, ch. XXI, 262. Therefore, “Liberty and Necessity are Consistent: As in the water, that hath not only liberty, but a necessity of descending by the Channel: so likewise in the Actions which men voluntarily do; . . . to him that could see the connection of . . . causes, the necessity of all mens voluntary actions, would appear manifest.”., ibid., 263.

35 On the postulate of transcendental freedom and its opposition to determinism, the Kant scholar Henry Allison remarks: “Unfortunately, it is . . . no exaggeration to state that Kant’s theory of freedom is the most difficult aspect of his philosophy to interpret, let alone defend. . . . Nevertheless, it is relatively noncontroversial that at the heart of Kant’s account of freedom in all three Critiques and in his major writings on moral philosophy is the problematic conception of transcendental freedom, which is an explicitly indeterminist or incompatibilist conception (requiring an independance of determinability by all antecedent causes in the phenomenal world). In fact, Kant himself emphasizes the point . . .”; Kant’s Theory of Freedom, 1. In Kant’s own words: “The will [der Wille] is a kind of causality belonging to living beings insofar as they are rational; freedom would be the property of this causality that makes it effective independent of any determination by a prior cause.”, Grundlegung, 446f. And: “That choice [Willkürlich] which can be determined by pure reason is called free choice [die freie Willkühr]. . . . Freedom of

interesting figure in the history of liberalism, nor does it reduce his importance to us today in matters moral and political.36

§ 51: The best-judges doctrine in the context of ordinary life

Whether the best-judges doctrine is true or false, seen from the perspective of ordinary, everyday, nonphilosophical life I think it is fair to say that our self-image encapsulates the view that we generally are the best judges of our own interests. In some instances, then, we would say that we are not. For example, one sometimes hear people complaining that they didn’t know their own interests at particular past points in time. That is probably why our best thoughts are said to be afterthoughts — especially those thoughts which emerge after we have done (what we now take to be) stupid things. But even so, a person might now be wrong in thinking he acted contrary to his own interests that other time. Looking back, he might be exercising lousy or misguided self-criticism. Also, he might misunderstand his own interests at present as well. So while he for the moment might feel confident that “Now I see”, he might be wrong this time around too — and, possibly, for the rest of his life.37

There are, then, several reasons a person can have for doubting the view that he is the best judge of his own interests at particular points in time, though he doesn’t doubt it at a general level. For he will be reluctant to let go of the idea that, after all, he is the best judge of his own interests — even if he might acknowledge that a close friend, say, at a particular point were able to see what was best for him more clearly than he was able to himself. But note that even in holding his friend’s judgement to be “better” the standard of measurement is what he himself takes to be his own interests: it is against the background of these

36 And one could add: the fact that Kant’s mysterious “Ding an sich” forms a central precondition of his theoretical philosophy (epistemology) doesn’t alter the fact that his Kritik der reinen Vernunft is one of the greatest works in epistemology ever.

37 In saying so I am of course presuming that there exists a correct understanding of what that (or any) person’s interests really are — only he never came close enough to realize what that understanding was. Yet this presumption is just a presumption of this particular train of thought. I am not trying to defend some sort of metaphysical realism here. (But if metaphysical realism captures the truth in this regard, perhaps we would finally come to know the truth about our own interests post mortem if we were to wake up in a Platonic world of Forms. To some, that probably would mean bad luck indeed: knowing what one should have done “down there” won’t be much of a comfort. Others will be glad to learn they lived a life pretty close to what was objectively their own interests when the soul was “contained” in the body, as Plato would have put it.)

38 we saw in § 19 that he doesn’t argue at all for any of the rights he espouses.

39 A remark on a philosopher whose position does depend upon the truth of this doctrine, but who thinks there are exceptions to the doctrine so that it is sometimes a false doctrine, namely, John Stuart Mill. An exception is constituted by something Nozick explicitly allows: selling yourself into slavery. Says Mill: “[O]ne exception to the doctrine that individuals are the best judges of their own interests, is when an individual attempts to decide irrevocably now what will be best for his interest at some future and distant time.”; Principles of Political Economy, II, 459.

40 The incident in Waco, Texas, in April 1994 may serve as an example here. As one will recall, members of the David Koresh cult killed themselves by setting fire to their camp as the FBI stormed their besieged headquarters. Now most people certainly will say that the cult members had a totally misguided conception of their own interests. However, in using expressions like “hopeless judge” and “foolishly” I am not saying so. Note also that I am here passing over the issue of children’s rights: many children died in the Waco incident, and unless one thinks children enjoy no rights whatsoever (and are thus unconditionally owned by their parents) one cannot avoid the conclusion that the cult members violated their children’s right not to be assaulted and killed. (The issue of children’s rights is barely addressed in Nozick, we saw in § 44.) Seen through the eyes of Nozick’s non paternalistic position any grown up, i.e., a person having "come of age" (331), may join any cult and do anything to themselves up to the point at which their conduct threatens or violates other people’s rights. Now one of the Nozickian minimal state’s functions is the function "of protecting all its clients against violence, ..." (26) (Clearly the FBI acted to fulfill such a function in the Waco incident since their aim was to rescue the children as well as what they gathered were nonconsenting members kept at gunpoint so as to protect them against violence.) Were there to be many cults based on this contract within the Nozickian minimal state (within the framework for utopia; cf. Part III) it is easy to imagine how they could pose a tremendous, money and time consuming problem for the state’s police force: the minimal state might need a maximal FBI department in order to monitor contracts, investigate complaints from cult members, check whether what is going on within cults are really voluntarily consented to acts, etc. In short, the state could turn out to be something of a "police state" practicing “Big Brother sees you”-methods in order to be able to perform its protective function.
comment on that be? It would be "no comment"; he doesn’t, to put it bluntly, care about consequences an individual brings upon himself. All that matters in this connection is rights — "whatever the consequences" for me when I exercise my rights: "Individual rights are co-possible; each person may exercise his rights as he chooses." (166) (Cohen observes, we noted in § 31, that in Nozick, "certain freedoms, for example of contract, ought never to be infringed, whatever the consequences of allowing his exercise may be." Not even when speaking of the right to sell oneself into slavery does he discuss what consequences such selling might have for an individual — or for society at large.

An idea which suggests itself here as some sort of a partial "remedy" as regards empirical consequences might go something like this: "All right, we’ll allow you to sell yourself into slavery. But beware that you might regret doing so; we therefore demand that you are fully informed on what you’re about to do to yourself — you must read n pages of information on voluntary slavery published by the department of justice — and also that you take your time in the decision process in order to "cool things off" before making such a dramatic decision — postponing the decision for n days." Probably such constraints on individual choice would have the effect of reducing the number of people who do such stupid things to themselves as selling themselves into slavery, a proponent of this "remedy" view might think.

Though many will find this view plausible since it seems to "give rationality a chance", seen through Nozick’s non paternalistic position it is unacceptable. For he explicitly rejects “lesser paternalistic restrictions geared to nullify supposed defects in people’s decision processes ... — for example, compulsory information programs, waiting periods.” (324; italics mine) So, that B thinks there is something (perhaps disturbingly) wrong with the way in which A makes his decisions regarding his own life — “perhaps he consults tea leaves” (88) instead of the justice department’s recommended reading to find out whether to become a slave or not — gives B no right whatsoever to try to “protect” A from himself by introducing lesser paternalistic restrictions even. Now B may use his freedom of speech to cry out (loud) to A that B better do such and such for his own best interests. But what B would like A to do he may not legitimately make A do (acting through state officials, say) without thereby violating A’s rights of self-

ownership. (Hence laws and regulations — upon which the state can act — requiring waiting periods, for example, would be illegitimate.)

Arthur Kuflik claims that, “Of course, someone who is not in his right mind is not competent to make a contract in the first place and so the contract in question would be null and void.” But to say that competence in parties to a contract is a (minimal) requirement for a contract to be valid — whatever one thinks “competence” amounts to — is to impose a (lesser) paternalistic restriction geared to nullify a supposed defect in people’s decision processes; namely, the defect that they’re insane. (For some remarks on the problematic aspects of the notion of insanity, see § 59 below.) Naturally, if insanity in a person makes him dangerous to others things will be wholly different. For example, Gerald Dworkin reports that, “The D.C. Hospitalization of the Mentally Ill Act provides for involuntary hospitalization of a person who is “mentally ill, and because of that illness, is likely to injure himself or others if allowed to remain at liberty.” The term injure in this context applies to unintentional as well as intentional injuries.” If by “injury” one here understands “physically aggressing against” (32) a person, on the Nozickian conception this particular Act will be illegitimate as far as self-inflicted injury is concerned. Only the concern for others counts so as to legitimize the detention of a mentally ill person — regardless of his intentionally or unintentionally posing a threat to others; the mere fact that he, in a certain way or in certain ways, is a threat to others will suffice for his detention. (Cf. § 46 above on my example of the threatening junkie walking around with a knife. Also, look up my above discussion in § 14 on the legitimacy of preventive restraint — which is argued for by Nozick at 142.) Therefore Nozick would return Kuflik’s claim by stating something like this: “Of course, insanity in parties A, B, C, etc. to a contract can’t make legitimate our denying them to have their contract and making the state not enforce it. After all, we’re not their part-owners. (Nor are they our’s.)” Which yields the conclusion that a person’s state of mind is important only in relation to the rights of others.

But what of the cases of children and senile people, say. To act paternalistically towards children seems not only intuitively (if not conceptually!) correct but required too; clearly, we will hold, neither children nor senile people have the competence necessary to judge about their own interests — whatever we think that competence amounts to and whatever we think their interests "really"  


43 Dworkin, “Paternalism”, 66.
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are. And so we would agree with Kuflik that the validity of contracts do depend upon the competence in parties to a contract. We have seen, however (in § 44), that Nozick’s philosophizing as regards the rights of children, and hence as regards what they may do to themselves, is inconclusive. As for the case of senility and other comparable diseases, he gives us nothing to go on in order for us to decide whether he would take them to be incompetent in contractual relations. So here his implicit method of avoidance breaks in upon questions the importance of which no one can deny — and therefore that method also breaks down here, the critical reader will claim.

The fact remains, then, that to deny A the right to have X done to himself (by way of contract or otherwise) because we, when hearing of X, think that A is not “in his right mind”, is impermissible. But what of those special cases where there isn’t a grain of doubt that A is not “in his right mind”; i.e., it is not just something we think — like in the case of senility, where medical information puts the insanity of A beyond all reasonable doubt? If Nozick, by the logic of his own arguments, will be forced into replying that still these people own themselves and so may not be interfered with against their will, then it is clear that his position lacks the conceptual resources necessary for grappling with such difficult cases. Put differently: no purely rights-based considerations appear capable of resolving such cases. Of course, there will be borderline cases in which it might prove impossible to settle the matter once and for all; is A insane from a strictly empirical, medical point of view (the presence of full-blown Alzheimer’s disease in A would yield an unambiguous “yes” to that question) or is he insane according to our normative conception of what insanity amounts to? (“People who do X ought to be considered insane.”) But anyhow it’s a matter of forcing A into acting on a conception of his own best interest that is really ours.

In defence of Nozick the following might be said: True, the case of senility, as well as borderline cases, pose a challenge to his position which the position might be unable to meet. But once we start classifying people along an axis of competence, say, we confront other problems: where to draw the line; who is to draw it, whence the right of those people to draw such lines at all; and whence the right to act upon the lines thus drawn; etc. In any event, one will run afoot of the self-ownership of some people. To that Nozick might respond: “All right, will those of you who advocate such violations please step forward and show us your arguments?” In other words: he would be saying that the burden of proof falls upon those unwilling to always respect other people’s self-ownership.

Now, in not caring about self-inflicted consequences stemming from doing X nor about what causes people to inflict X upon themselves, Nozick is of course open to the charge that he is “a one-eyed man” who sees nothing but formal rights and so turns his back on what might happen in the real world when people exercise those rights — much more open, anyway, than is Kant, since the charge of “empty formalism” often directed against Kant rests on a quite one-eyed reading of the Categorical Imperative. But Nozick has, in general, no more thing to say about empirical consequences “in the one end” — the “effect” side — and about what motivates people’s action “in the other end” — the “cause” side — is to some degree intentional in him, I think. It is a flaw that may be seen in the light of the fact that Anarchy, State, and Utopia doesn’t pretend to say wise things on all of the multitudinous aspects of individual rights; rather, it is, as I referred to in the Introduction, § 3, what Nozick calls “a philosophical exploration of issues … which arise and interconnect when we consider individual rights and the state. … I believe that there also is a place and a function in our ongoing intellectual life for a less complete work, containing unfinished presentations, conjectures, open questions and problems, leads, side connections, as well as a main line of argument.” (xii) Still, that statement can of course serve...
as an (bad) excuse for not addressing, or for barely addressing, particular issues one ought to address, or address properly, when considering individual rights and the state. (This critical remark applies to this work of mine as well since I here share, as I said in § 3, Nozick’s attitude as regards “philosophical exploration”.) For example, it will be thought that one important issue Nozick shouldn’t have passed over so lightly is the issue of children’s rights.

§ 53: Rationality according to Anarchy, State, and Utopia

What could be said about the claims that people are “rational beings” and that they are “the sole generators of their own wants and preferences” (Lukes’ expressions) so as to make these claims relevant to my discussion of Nozick — how to use these two claims to cast light on his nonpaternalistic position? Now I think they are relevant inasmuch as Nozick just takes for granted the first one without explaining what it is he takes for granted in so doing, whereas he would deny the second — which I will discuss in the next section.

To begin with, it is a very telling fact that the word “rationality” doesn’t appear at all in the Index. Nor is there any place for it there as long as the concept of rationality is, mainly, treated like this — in a footnote near the closing of the book: “I use “rational” or “rational creature” as short for beings having those properties in virtue of which a being has those full rights that human beings have; I do not mean here to say anything about what those properties are. Some brief introductory remarks on the issue are contained in Chapter 3.” (299, fn) Here Nozick employs a method of avoidance once more — this time towards the concept of rationality, he doesn’t want to plunge into the metaphysics of that concept.

Nonetheless, the conception of rationality to be extracted from his book taken as a whole is an instrumental one, I think. This is perhaps seen most clearly in the description of how protective associations emerge in the (Lockean) state of nature (cf. 12-15 and my § 70 below): People’s main goal is to protect their rights from being violated and so they select the most efficient means, i.e., they found and become members of protective associations, to achieve that end — though all means must “pass the test” of Locke’s law of nature; the end then will not justify just any means. In discussing the question, “What are constraints based upon?” (cf. 48-51), Nozick considers what might be called the received view of rationality as regards the worth of persons — and this consideration makes up Chapter 3’s “brief introductory remarks on the issue” of rationality and rights—deserving properties in humans. Traditional proposals, he says, include the view “that people count for something” (36) — recall from § 17 his scepticism with regard to this view — because they are “rational (capable of using abstract concepts, not tied to responses to immediate stimuli), ...” (48) Despite the fact that he himself doesn’t explicitly endorse it — “Let us ignore questions about how [the notion of rationality is] precisely to be understood, ...” (48) — it is clear, I think, that he wouldn’t reject such an understanding of what it means to be rational. In any event, that people are capable of using abstract concepts and that they are not tied to responses to immediate stimuli are elements of rationality one must surely “include” in the instrumental conception of rationality, whatever else one includes in it. (It requires some abstract thinking and so on to organize protective associations, for instance.) So while Nozick doesn’t actually say this is his understanding of what it means to be rational too, this understanding fits the otherwise instrumental conception of rationality in Anarchy, State, and Utopia.

While the libertarian position hinges on an instrumental conception of rationality, The Nature of Rationality offers a much more complex picture of human rationality. But still instrumental rationality is held to be the “default theory”:

The notion of instrumental rationality is a powerful and natural one. ... Instrumental rationality is within the intersection of all theories of rationality (and perhaps nothing else is). In this sense, instrumental rationality is the default theory, the theory all disciplans can take for granted, whatever else they think. There is something more, I think. The instrumental theory of rationality does not seem to stand in need of justification, whereas every other theory does. Every other theory must produce reasons for holding that what it demarcates is indeed rationality. Instrumental rationality is the base state. The question is whether it is the whole of rationality.47

However, as far as the libertarian position is concerned, this work on rationality merely restates the rejection of it (we saw in § 5), and it is not a work which addresses the libertarian conception of rationality specifically. Rather, it develops a theory of rationality of its own. I therefore will not consider it here. As for Philosophical Explanations, there are some remarks on rationality and evolution and on rationality in science and ethics, but none of it has any bearing upon the libertarian conception.48

If we look backwards in time to the seminal article “Coercion” there isn’t much in it on rationality in full-blooded humans; rather, Nozick explicitly states

47 Nozick, The Nature of Rationality, 133.
48 See Philosophical Explanations, 336-338 and 482-484, respectively.
that, "I shall consider only a partially described person, whom I shall call the Rational Man, and unfortunately shall not get to us."\textsuperscript{49}

§ 54: Paternalism and self-ownership

It seems obvious that a libertarian position, given libertarianism’s highly individualistic conception of man, would not put forward the “accusation” that generally people are not the best judges of their own interests and that generally people are “irrational” or the like. But then it also seems obvious, perhaps, that it would attack such claims. Be that as it may, Nozick, we have seen, eschews debates about the best-judges doctrine (as I have called it) as well as debates about rationality in \textit{Anarchy, State, and Utopia}. And there is a special reason why that is so, I think; a reason why he doesn’t want to become entangled in such debates.

To disclose that reason, let me begin with pointing to the relation between the nonpaternalistic position and the thesis of self-ownership. It would be correct to say, I think, that there is a direct linkage, as it were, between this position and that thesis: it is because people own themselves that they should not be protected against just \textit{any} conceivable form of paternalism; recall Nozick saying that they may want to be paternalistically regulated (cf. 14). Therefore Nozick’s nonpaternalistic position is fully in accord with self-ownership since that position leaves everything open as regards paternalism. Which yields the noteworthy conclusion that an \textit{antipaternalistic} position, exactly because it “wages war on” paternalism as such, principally speaking \textit{conflicts} with a person’s self-ownership which allows him to have whichever kind of paternalism he voluntarily chooses to have. (That is not to say that a nonpaternalistic position \textit{necessarily} doesn’t conflict with a person’s self-ownership. Though Nozick’s nonpaternalistic position doesn’t, other versions may. Below I construe the libertarian Jan Narveson’s position as one which does.)

Now, what has the “direct linkage” referred to above got to do with debates about the best-judges doctrine and about rationality? This, I propose: If I literally own myself, \textit{from the perspective of rights} it means nothing that others might think I am not capable of choice because I am not rational (according to their or any other concept or conception of rationality) — that they find my “decision process” defective. As long as I, simply by owning myself, have the \textit{right} to do anything to myself, no one else has a right to stop me from doing whatever it is

\textsuperscript{49} Nozick, “Coercion”, 129.

that I want to do to myself. Of course, as I have pointed out, anyone may \textit{warn} me against doing what I am about to do. If he owns a newspaper, he may write a column warning the general public against aping my conduct, for instance. (Perhaps I, being an exhibitionist, have announced that I am going to have someone play Russian roulette on me in public at a particular date and time and the newspaper columnist takes this to be a mad — i.e., irrational — degrading thing to do.) What others may not do is trying to coerce me into not carrying out my plan because, say, they think I am totally out of my mind or because I have bad influence on others. (Cf., once more, my example of the junkie — this time concerning his “appearance” in § 45: the mere fact that his taking drugs badly influences family members is no ground for coercing him into not taking drugs. We have seen, in § 27, that Nozick rejects the view that people have a right to a say in the decisions of others that importantly affect their lives.) Your right to do whatever you fancy to yourself is not “yours only” when you act rationally and know what you’re doing — regardless of which content is poured into these notions. So the “special reason” why Nozick avoids debates about rationality and the best-judges doctrine is his obsession with the (formal) Lockeian rights solely: "Nozick is distinctive in the emphasis he puts upon rights of self-ownership. ...

Individual rights, for Nozick, \textit{fill the whole political landscape}.”\textsuperscript{50} When rights (of self-ownership) fill the whole political landscape, mere reference to what rights I enjoy is enough to settle things as far as self-inflicted consequences are concerned — it’s the end of argument, so to speak. (But, we have seen, this limited scope has its costs too; for example, the issue of what makes a person competent to enter contracts seems to simply vanish as an issue on this limited scope.)

Armed with his “strong” theory of rights, Nozick asks whether \textit{any} state action towards individuals is justifiable. Recall the opening words of his treatise: “So strong and far-reaching are [our] rights that they raise the question of what, if \textit{anything}, the state and its officials may do. How much room do individual rights leave for the state?” (ix; italics mine) Now the argument demonstrates that — after all — individual rights leave \textit{some} room for the state; namely, its legitimate “functions of protecting all its citizens against violence, theft, and fraud, and ... the enforcement of contracts, and so on, ...” (26) (I discuss at length the Nozickian — and the Kantian — concept of the state in the next chapter [IV].) No room is left for state action that runs afoul of the ownership I have in myself.

\textsuperscript{50} Wolf, Robert Nozick, 8, italics mine.
I conjecture that one can also, taking the strong theory as one’s point of departure, derive the following contemplation: A reason why questions concerning the soundness of individual judgements (“decision processes”) and of what rationality “really is” cannot play an important role is that a nonvoluntary “investigation” into whether a person actually is the best judge of his own interests and whether he is rational would in itself constitute an intrusion into that person’s sphere of rights: it would amount to using force directed against his (personal) liberty and so would violate his right to noninterference with his liberty.

Contrary to the Nozickian view, apparently, Feinberg holds the following view: “if a policeman (or anyone else) sees John Doe about to chop off his hand with an ax, he is perfectly justified in using force to prevent him”, and afterwards “it will be up to Doe to prove before an official tribunal that he is calm, competent, and free, and still wishes to chop off his hand.” Now, besides advocating the violation of Doe’s liberty, this position also discriminates against irrational people: it coerces such people into taking “the rational attitude” towards life instead of the one they already live by. (Would it be appropriate with an official tribunal before which philosophers in the liberal tradition were required to prove that they’re really liberals?) Furthermore, from a purely philosophical point of view, Nozick would point out that arguments for rationality are circular: “What do you mean, you’re willing to be irrational? You shouldn’t be irrational because . . .” … this sentence [cannot be completed] in a noncircular fashion [because one] can only produce reasons for accepting reasons . . ."52

§ 55: Am I the sole generator of my own wants and preferences?

I said that Nozick would deny the claim that people “are the sole generators of their own wants and preferences”. Such a denial is given indirectly when he speaks of “the fact that we partially are “social products” in that we benefit from current patterns and forms created by the multitudinous actions of a long string of long-forgotten people, forms which include institutions, ways of doing things, and language (whose social nature may involve our current use depending upon Wittensteinian matching of the speech of others) . . .” (95) That this is an indirect denial can be seen from the expression “partially”. If we partially are social products, it cannot be the case that we are the sole generators of our own wants and preferences; each individual is not totally responsible for having exactly those wants and preferences he has — which could be seen as a concession to the “communitarian” political philosopher. Although this will be obvious to most — is it really intelligible that a person is a “sole generator” as described; is not that claim plainly false? — it is not obvious what Nozick means by “partially” here. Yet that is insignificant to his nonpaternalistic position for the following reason: The fact that my choices are culturally shaped, steered by certain socializations, moulded in different milieus, and so on, does not alter that I own myself and eo ipso may not be constrained in my self-regarding53 acts; that this is the case — presuming that it is — doesn’t make it all right to violate logical rules of inference by saying that accordingly one can deduce the conclusion that I ought not (or ought) to have ownership in myself.54 Put differently: I do not own myself to a lesser degree just because I partially am a “social product”. (And, I take it, if not being a “social product” at all is seen as a requirement for having ownership in oneself, presumably no people would own themselves.)

§ 56: Why people don’t “owe” their society anything

It is worth mentioning in connection with the “social products” issue that Nozick is explicit in his rejection of the view that we “owe” something to the society we live in just because we are to some extent social products: “the fact that we partially are “social products”... does not create in us a general floating debt which the current society can collect and use as it will.” (95) In discussing what, following Rawls, Nozick calls H. L. A. Hart’s principle of fairness, he writes: “This principle holds that when a number of persons engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission.” (90) The discussion ends by

51 Feinberg, Social Philosophy, 49-50.
52 Nozick, Philosophical Explanations, 4.
53 Notice that the “classic” problem of distinguishing between acts which are “purely” self-regarding (if there are such acts at all) and those who are other-regarding is no problem for Nozick’s position. Why? Because, as we have seen, when your acts affect the lives of others — even importantly so — as long as you act within your rights they have no right to a say over what you do. On the Nozickian account, then, a self-regarding act may be identified as one consistent with the self-ownership of all.
54 For that argument to succeed, at minimum it would have to be shown in advance that the “Naturalistic Fallacy” is no real fallacy. Though that may of course be correct, showing it to be is some burden of proof for a philosopher to grapple with.
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the observation that, "even if the principle could be formulated so that it was no longer open to objection, it would not serve to obviate the need for other persons' consenting to cooperate and limit their own activities." (95)

In other words: demanding that people must somehow contribute to society, or to the "Common Good", because they benefit from society as described — by restricting their liberty, offering their labour, paying taxes for welfare purposes, some other form of cooperation, etc. — and then enforcing this demand because one (incorrectly) thinks one has a right to do so, overlooks the fact that people own themselves and so may not be used "as means or tools or instruments or resources" (333-334) for any purpose without their consent.55 Thus, "The principle of fairness, as we stated it following Hart and Rawls, is objectionable and unacceptable." (93)

§ 57: "Between consenting adults"

One of the most well-known statements of Anarchy, State, and Utopia is the statement that, "The socialist society would have to forbid capitalist acts between consenting adults." (163) To summarize some of my discussion this far, I propose the following re-wording of this statement: "The paternal state would have to forbid all those acts between consenting adults that it judges to be irrational and contrary to the adults' own interests." As we have seen, unless consent is obtained, even to judge in these matters a state would have to violate its citizens' right to personal liberty — a liberty that can have no limits as long as people are said to own themselves unconditionally. Suppose the state makes its judgement "from a distance": in order to not violate my right to personal liberty (in order to not intrude into my private life) it instead simply deems my conduct irrational, say, contrary to its psychiatrists' standards of rationality. Now that won't do either, since this is yet another way of limiting — i.e., violating — a person's right to do to himself anything; yet another way, if you like, of not showing respect for his self-ownership.

55 Or may they? Consider this passage in Nozick: "Even if almost everyone wished to live in a communist community, so that there weren't any viable non-communist communities, no particular community need also (though it is to be hoped that one would) allow a resident individual to opt out of their sharing arrangements. The recalcitrant individual has no alternative but to conform. Still, the others do not force him to conform, and his rights are not violated. He has no right that the others cooperate in making his nonconformity feasible." (322; italics mine) May one say that because this individual has no alternative but to conform to the community's sharing arrangements, the community uses him as a resource or instrument for its own purposes? At least he doesn't consent to living according to the community's regulations. I shall ask in § 84 whether not this view of Nozick's leads to a ("Kantian") "dogma of absolute sovereignty" in him.

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It is, then, literally none of the state's business to coerce me into not doing "irrational act IA, n", or whatever sort of act, to myself. The minimal state is there to protect me from others — not from myself. Its job is to protect me from others who, in various ways, threaten to use, or use, force and fraud against me and who steal from me. In addition, it's there to enforce contracts I have entered. "In a libertarian world", observes Don Herzog, "contract emerges as the paradigm conception of what consent or choice amounts to."56 Accordingly, in enforcing individuals' contracts the minimal state demonstrates its willingness to take seriously their choices.

§ 58: Paternalism, consent, and autonomy: two conflicting intuitions

"Of course adults should be at liberty to consent to, and contract into, living as they please, to "do it their way", and of course no one may interfere with their decisions in this respect."

While you might agree with this at a superficial level, you will not be so sure, perhaps, if faced with particular theoretical examples that follow deductively or by implication, not to mention real-life examples. For instance, not being a sadist yourself, you will not appreciate the sound of the screams of your neighbour's consenting slave as he beats him every evening while you're sitting down to enjoy your supper. Possessing the knowledge of what is taking place next door might in itself be a tremendous challenge to your first, intuitive response that "of course" adults (yourself included) should be at liberty to consent to living as they please: your knowledge of what is happening next door might produce very strong feelings of disgust, anger and despair in you. Yet you think that this state of affairs is insufficient ground for you (i.e., an outsider) to have a right to interfere.57 Unsurprisingly, Nozick thinks the same: "Even if envy is more tractable than our considerations imply, it would be objectionable to intervene to reduce someone's situation in order to lessen the envy and unhappiness others feel in knowing of this situation. Such a policy is comparable to one that forbids some act (for example, racially mixed couples walking holding hands) because the mere knowledge that it is being done makes others unhappy (see Chapter 10)." (245; italics mine)

A continuation of your thinking could look like this: "Though I dislike

56 Herzog, Happy Slaves, 233.
57 And upon reflecting on (what you hold to be) the twisted mind of your neighbour — "That sadistic perversion!" — you appreciate greatly the fact that he has no right to interfere with your lifestyle.
enormously what my neighbour does to his consenting slave, after all we are speaking of consenting adults here. And: racially mixed couples walking holding hands is also disliked greatly by some people. But of course they oughtn’t to have a right to interfere with such couples.” Still, you might have your doubts whether your liberal attitude should be that liberal. A dramatic story about a consenting slave being mistreated, a story tailor-made to illustrate a possible consequence of Nozick’s understanding of rights as something we own — and therefore may sell or exchange in return for certain services — and his nonpaternalistic position in tandem, is the following:

Medical expertise, not being a natural resource, does not fall under Nozick’s “Lockean proviso” (cf. ASU 181, the cases of the medical researcher and the surgeon). The following trialogue is then a realistic scenario within Nozick’s libertarian society. A police officer comes upon a couple struggling with each other, the man evidently trying to rape the woman.

Woman: Please, sir, please help me.
Officer (to man): Hey, you, let her go at once!
Man: Don’t get involved.
Officer: I must. You are violating the woman’s right not to be assaulted.
Man: No, I’m not. She is my slave. Here are the papers, signed by herself.
Woman: But I was coerced into signing. He said he would not treat my father if I refused to sign.
Officer: That’s not coercion but at most duress. He was at liberty not to treat your father or to ask compensation for treating him.
Woman: But my father is dead!
Man: The contract says only that I would try to save him, and I did.
Officer (to woman): I’m sorry, ma’am, but I cannot help you.
Man: But you can help me in forcing her to fulfill her contractual obligations. She has already scratched me. See if you can tie her hands.
(Officer ties woman’s hands, she screams for help as she is being raped. . . .)
Man (to Officer): I’m glad the police are protecting citizens’ rights. Isn’t she great? My sons will have lots of fun with her when I bring her home.58

While this might not be a “realistic” scenario, at least it is a possible scenario. Anyway, that need not bother us here. What is important is the principal point that the scenario does not, as far as the woman is concerned, involve rights violations given the fusion of Nozick’s conception of rights and his nonpaternalistic position. (As far as the slaveholder is concerned, the woman violates his right not to be scratched — she doesn’t respect his right to noninterference with his health.)

Why are we uncomfortable with this story? (Some are delighted, I guess, dreaming of finding a female total slave.) I believe a considerable portion of the explanation is to be found in the fact that there is an intuition pulling us in the opposite direction of the first, spontaneous intuition that “of course”, etc. What might that intuition be and how to account for it? Laying bare the exact nature of an intuition is no easy job, if possible to carry out at all. Yet the intuition I am referring to here has much to do with the fact that in some instances we feel that people clearly don’t know what they are doing or have done to themselves; that clearly they are not “the best judges of their own interests”, and certainly not rational. So their choices are not made autonomously, we would add.59 Thus we also find it difficult to speak of “consenting” adults in these cases. Which seems to demand for some sort of paternalism in special cases; sometimes people must be protected against themselves.

Someone arguing thus need not be a proponent of a paternalistic position, though. He could, for example, stick to a nonpaternalistic position by arguing as follows:

1. There is a moral requirement upon us to respect people’s voluntary choices.
2. In order to respect people’s voluntary choices, we must allow them to make choices we ourselves would deem morally wrong.
3. Therefore we must, among other things, respect the choice to live subject to certain paternalistic arrangements.
4. To be consistent about this matter, it follows that we should adopt a nonpaternalistic position — as opposed to an antipaternalistic position which, principially, conflicts with 1. because 3, strictly speaking, cannot be drawn from an antipaternalistic position.

her slavery will be partial — not total. The slaveholder in Pegge’s example then couldn’t say simply that, “She is my slave,” but would need to add: “Except when conditions C apply.” On the issue of total vs. partial slavery, see § 67 below.

59 I’ll get to the concept of autonomy, and to Kant’s and Nozick’s understanding of autonomy, in §§ 60 and 61.
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5. In some instances, however, people's choice to have X done to themselves is not made autonomously — like in the case of the female slave, perhaps.
6. Therefore, in those instances they do not really consent to having X done to themselves.
7. Therefore there is sometimes a contrary moral requirement to that of 1. not to respect people's voluntary choices, i.e., when they choose nonautonomously.
8. Although their choices might be voluntary according to themselves, they do not acknowledge that they are acting nonautonomously when choosing.
9. Sometimes, then, paternalistic action towards others — that is, disregarding their choices — becomes a duty.

If one holds this kind of nonpaternalistic position, one may be called a proponent of “general or limited nonpaternalism”. But why is this position nonpaternalistic and whence its generality? Its nonpaternalism is seen in 3.; it doesn’t reject paternalism as such. And it is general/limited because a general position is general exactly in that it is sensitive to limitations; limitations enter the picture here when nonautonomous choosing does. A position which is insensitive in this respect would be a totally or unlimited nonpaternalistic position — i.e., we would have Nozick’s position.

On the other hand, a proponent of “general or limited paternalism” — i.e., a proponent of a paternalistic position — will adopt paternalism as the general rule but allow that sometimes, as an exception to the rule, paternalism is not the answer. Persons and organizations eager to tell others how to live their lives — the “Moral Majority”, Muslim fundamentalists, anti-liberal politicians, etc. — fit in here, since they often advocate extensive paternalistic regulation of society (by wanting to enact laws through which such regulation becomes possible).

But all eager “friends of liberty” feeling uncomfortable with the story about the female total slave must at some point face this question: how to justify the view that individual liberty ought to be “general not total”; or, alternatively, “limited not unlimited” — how to justify what I have called a general (limited) nonpaternalistic position, exemplified in steps 1. through 9. above?

§ 59: A remark on the notion of nonautonomous choice

A few words on the notion of nonautonomous choice. The belief that people generally are the best judges of their own interests doesn’t preclude, due to the “generally”, that we might find ourselves in a particular situation — call it “Sj” — in which we take all the information available to us to suggest unambiguously that a particular person — call him “A” — is not the best judge of his own interests as he is about to do X to himself. And if A is held to clearly be lacking

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insight into what is best for him when doing act X to himself in Sj, his act is not done autonomously, we will be inclined to conclude; whatever we want to call his acting we won’t call it autonomous acting — that it is not.

Sj with X could be thought of as being parallel to another situation we occasionally find ourselves in in real life: While it seems impossible to tell positively what kind of person a mentally healthy person is, yet we sometimes encounter paradigmatic cases of mentally ill persons, persons who are not “in their right mind”; it proves far easier to approach the matter via negativa: “I can’t tell you what sanity is, but he certainly is not sane.”

Although the clearly-not approach (as I would like to call it) has a certain prima facie plausibility when taken at face value, when scrutinized it runs into difficulties. The main problem, I think, is this: If you take somebody’s self-regarding act in Sj to be “a sure sign of a sick mind” you already have some conception or other of what is best for him; if he really knew his own interests in Sj he wouldn’t ever do such a crazy thing as to X, you implicitly hold. So after all you do believe in the possibility of positively determining what is best for him. The problem, then, is whether the via negativa statement that someone now clearly misinterprets his own interests really is intelligible without some “positive” judgement about the matter.

Note that this line of reasoning does not apply to the cases of children and senile people that I discussed above, for this reason: Should there exist a correct understanding of what A’s (or anybody’s) interests really are A might come to find out about or “discover” his own interests some day (cf. “if he really knew”). Children and senile people, on the other hand, because of their clearly limited access to the world, cannot for that reason make such a discovery — though that is of course less and less true for children as they approach adulthood; as for senile people, there presumably takes place insignificant changes in cognitive

60 Perhaps you reason like that because the person in question “rejects” Kant’s transcendent philosophy in this way: “A police officer presents a report about a car accident, but to the question where the accident took place he says that it just occurred without occurring anywhere — and to the question of its time he says that it just occurred, but not at any definite moment — and finally to the question of possible causes, he declares that there were no causes, the accident just occurred. Such a person does not commit merely an empirical mistake; to the extent that he is serious in saying all this, he can be said to be deeply confused. What he says is quite unbelievable. He is out of his mind. This rough “argument from absurdity” indicates some notion of irrefutability or unavoidability: location in time and space, and causes, are conditions for the meaningfulness of any talk about car accidents — they are not merely empirical conditions, but somehow necessary conditions. In this sense, arguments from absurdity are useful for a discussion of the epistemological status of “transcendental preconditions.””, Skirbekk, “Madness and Reason: Reductio ad Pathologiacum as a Via Negativa for Elucidating the Universal-Pragmatic Notion of Rationality?”, 127.
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capabilities (detioriation being the normal picture). Therefore it doesn’t make sense to say of a child or a senile person that, “if he really knew his own interests in S he wouldn’t ever do such a crazy thing as X”. For his being a child or his suffering from senility is exactly what blocks the road of getting to know his own interests, even granting the interests’ objective existence.

§ 60: Kant on autonomy, freedom of the will, and the Wille-Willkür distinction

To say that autonomy in Kant is no easy matter is an understatement indeed. To begin with, what he calls the principle of autonomy is stated as, “Always choose in such a way that in the same volition the maxims of the choice are at the same time present as universal law.” Later, it is said that this principle is only possible, “on the presupposition of freedom of the will [der Freiheit des Willens] ...” For, “What else”, Kant asks, “can freedom of the will be but autonomy, i.e., the property that the will has of being a law to itself? ... Now this is precisely the formula of the categorical imperative and is the principle of morality,”61 It is not obvious what is being claimed here. Allison, for one, remarks that, “the account of autonomy as a principle is itself ambiguous, since Kant treats it both as the supreme condition of the possibility of the categorical imperative and as itself a formula for this imperative.”62 R. P. Wolff complains that, “when we ask for an explanation of the central notion of autonomy, we are merely told it must be the source of unconditional obligation since heteronomy has already been eliminated, and nothing else remains but autonomy.”63

Furthermore, the notion of autonomy is linked with the “Formula of Humanity as an End in Itself”: “autonomy is the ground of the dignity [Würde] of human nature and of every rational nature.”64, and elsewhere: “only man, and, with him, every rational creature, is an end in himself [Zweck an sich selbst]. He is the subject of the moral law which is holy because of the autonomy of his freedom.”65 We saw in § 35, in connection with Nozick’s use of Kant’s Second Formula, that this formula raises certain difficulties for the interpreter, at least as far as the “positive” part of it is concerned (the “negative” part being that of

never treating another simply as a means). We may say, then, that Kant links the problematic notion of autonomy with yet another problematic notion.

Autonomy in Kant is also closely associated with the Wille-Willkür distinction. (Here ignore philosophical and terminological difficulties related to the distinction, and the fact that, having drawn the distinction, Kant doesn’t always observe it.) Says Kant: “The autonomy of the will [An'autonomie des Willens] is the sole principle of all moral laws ... heteronomy of choice [Willkür], on the other hand, ... is opposed to the principle of obligation and to the morality of the will.”66 Kant attempts a clarification of the Wille-Willkür distinction in the following crucial passage in the Rechtslehre:

Laws proceed from the will [von dem Willen], maxims from choice [von der Willkür]. In man the latter is the capacity for free choice; the will [der Wille], which is directed to nothing beyond the law itself, cannot be called either free or unfree, since it is not directed to actions but immediately to giving laws for the maxims of actions (and is, therefore, practical reason itself). Hence the will directs with absolute necessity and is itself subject to no necessitation. Only choice [die Willkür] can therefore be called free.67

And in the Introduction to that work, it is made clear that Willkür is “the capacity for doing or refraining from doing as one pleases”, and that in so far as this capacity “is joined with one’s consciousness of the capacity to bring about its object by one’s action it is called capacity for choice; ...” On the other hand, Wille is “the capacity for desire considered not so much in relation to action (as the capacity for choice [Willkür] is) but rather in relation to the ground determining choice to action.”68 We may notice that the Wille-Willkür distinction is apparent already in Kritik der reinen Vernunft where it is said that, “Freedom in the practical sense is the will’s independence [die Unabhängigkeit der Willkür] of coercion through sensuous impulses. For a will [eine Willkür] is sensuous, in so far as it is pathologically affected, i.e. by sensuous motives; ...”69 (In this work Kant consistently uses Willkür to refer to our capacity for choice.) In Die Religion innerhalb der Grenzen der bloßen Vernunft, the discussion of radical evil addresses the distinction too in that Kant sees evil as a corruption of Willkür — but not of Wille: the “perversion of our will [unserer Willkür]” occurs when

61 Kant, Grundlegung, 440/44; 461/60; 447/49.
62 Allison, Kant’s Theory of Freedom, 94-95; italics mine.
64 Kant, Grundlegung, 436/44.
65 Kant, Kritik der praktischen Vernunft, 87/91; italics mine.
66 ibid., 33/33.
67 Kant, Rechtslehre, 226/82.
68 ibid., 213/42.
69 ibid., 534; B 562/465.
that will makes "lower incentives supreme among its maxims, ..."70

By way of a summary, we may say that Willkär is subject to the constraint of Wille and that the former can either act in accordance with or contrary to the prescriptions of the latter.

§ 61: Nozick on free will and on autonomy

Like with rationality, neither does the word "autonomy" appear in the Index of Anarchy, State, and Utopia. And like with rationality, the issue of autonomy largely falls away due to the method of avoidance — as does the issue of the freedom of the will: Nozick lists the proposals, among other proposals, that a human being is a creature "possessing free will" and that it is "a moral agent capable of guiding its behavior by moral principles ..." (48) (Remark that Nozick treats "rationality, free will, and moral agency individually and separately." [49]; hence my distinguishing between the issue of free will and that of [moral] autonomy in the following discussion — and hence my separate discussion of rationality above in § 53.) But, he adds, he prefers to "ignore questions about how these notions are precisely to be understood, and whether the characteristics are possessed, and possessed uniquely, by man, ..." (48) So whereas Hobbes (we saw in § 50) rejects the idea of the freedom of the will and Kant defines it, Nozick merely lists it as a "traditional proposal" and thus neither denies nor affirms the idea.

In Philosophical Explanations, however, there is an extensive and very complex discussion of the idea. I will not — nor can I — go into that discussion here71, but let me just point out that Nozick there wants to "have" the idea yet finds himself unable to deliver decisive arguments in favour of it.72

70 Kant, Die Religion innerhalb der Grenzen der bloßen Vernunft, 46/38.

71 Like I said in § 50, the issue of free will belongs in the basket of metaphysical and epistemological questions that should be dealt with outside the field of political philosophy, therefore I "will not". (And therefore I find myself in complete agreement with Nozick's avoiding the issue of free will in Anarchy, State, and Utopia. His being so brief on rationality and autonomy I find more difficult to justify, after all, those concepts do make up important ingredients to the "package" known as political philosophy.) What is more, Nozick's discussion is so overwhelmingly intricate that assessing it will require much more space than I have available in this work; therefore I "can not". (As for the discussion's complexity, he notes: "Parts I and II of this chapter [on free will], it is only fair to warn the reader, contain more than any other chapter of this book. Over the years I have spent more time thinking about the problem of free will — it felt like banging my head against it — than about any other philosophical topic except perhaps the foundations of ethics.", Philosophical Explanations, 29.)

72 Who is (able to do so), one will ask. And will someone ever be able to do so, one also will wonder.

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How is free will possible? ... The problem is so intractable, so resistant to illuminating solution, that we shall have to approach it from several different directions. No one of the approaches turns out to be fully satisfactory, nor indeed do all together. ... we shall try to delineate an indeterminist view of free will. If some such view could be made to work, we would welcome it most. ... If we cannot solve the problem [of free will], at least we can surround it.73

Let it be noted, however, that according to Nozick's "closest relative" view of coercion in that work — on this view, look up § 28 above — a person acts freely when "no other's motives and intentions are as closely connected to [his] act" as his own.74 This, of course, doesn't "solve" the problem of free will; rather, it is a stipulative definition of what we should consider to be a free act were free will possible.

As for the issue of autonomy, the remarks about the moral agent capable of guiding his behaviour by moral principles (cf. 48) could, for instance, be taken to refer (implicitly) to a view close to Kant's view of responsibility: that only autonomous beings can be held responsible for the acts they perform — that "ought implies can". For if one says that man is capable of guiding his behaviour thus, one also holds that man is capable of declining to do so. (Otherwise man would be a creature incapable of such guiding: he would be a creature who just behaves according to moral principles — some sort of a "moral determinism"; we can't but act on moral principles.) For example, Kant makes it perfectly clear that it must be possible for us to choose evil for us to be viewed as responsible creatures: "Man himself must make or have made himself into whatever, in a moral sense, whether good or evil, he is or is to become. Either condition must be an effect of his free choice [Wirkung seiner freien Willkür]; for otherwise he could not be held responsible for it and could therefore be morally neither good nor evil."75

Kant of course doesn't believe that we can somehow prove that humans are capable of choosing autonomously. Quite the contrary: human choices seen from the perspective of the empirical world can be described as nothing but causally determined; if you look for autonomy in human choices you'll end up with nothing but deterministic conclusions since the description will be one of a chain

73 Nozick, Philosophical Explanations, 292-293.

74 Ibid., 49.

75 Kant, Die Religion innerhalb der Grenzen der bloßen Vernunft, 48/40. For some remarks of Nozick's on the issue of responsibility, see 130 and 342, n6, and his "Coercion", 135, as well as my discussion in the above § 31.
of causally related events (A’s choice of X was caused by the influence of Y; and
Y was set off by Z; and so on). Nozick, being true to his method of avoidance,
doesn’t disclose what he believes in or not as far as the supposed capacity of
autonomous choosing is concerned. Rather, he asks, “If a being is capable of
choosing autonomously among alternatives, is there some reason to let it do so?
Are autonomous choices intrinsically good?” (48; first italics mine)

“The predicate “is autonomous” is ambiguous”, notes Kuflik, for, “In saying
that someone is an autonomous agent we could be saying any or all of the
following: (a) that the person in question is capable of functioning autonomously;
(b) that he actually does function autonomously; (c) that he is entitled to do so;
and (d) that he is actually respected in his right to so function. I assume that in
having the capacity one has the right.”76 Now Nozick, we have seen, doesn’t use
this predicate himself as an argument for his views on individual rights — but
notes that it is a “traditional proposal” which many other philosophers use as one
of their building blocks (arguments) upon which they erect a conception of rights.
Hence he would say that the truth of (a) at least hinges on the “traditional
proposal” concerning moral agency being true. I say “at least” since to be true for
the person in question, at a minimum it must (first) be true generally. But if it is
true in his case too, Nozick would grant that (b) could follow but that that will
then be an empirical question answerable against a conception of what moral
agency is taken to be. On the basis of his conception of rights, he wouldn’t support
(c) — and therefore (d) drops out of the picture. Why? Because, in
contradistinction to Kuflik, he wouldn’t “assume that in having the capacity [of
functioning autonomously] one has the right [to so function]”; rather, he would
say that one has a right to a domain of autonomy. Again, Philosophical
Explanations offers an illuminating account:

One view would be the following. It is important and valuable that a person have a range
of autonomy, a range or domain of action where he may choose as he wishes without
outside forcing. Recognizing and respecting such a domain of autonomy is a response to
the person as a value-seeking self, so we ought to recognize such a domain. This point
does not fix the extent or content of the domain. It is important that various people
recognize the same domain, though. ... Part of responding to another as a value-seeking
self is to coordinate our specification of the respected domain with others, so that the
person does have a generally recognized domain of autonomy, and also to publicly aw
our respect for this domain, so that he knows he is autonomous within it and can count
on that. ... There is much to be said for recognizing the widest possible domain of

autonomy, limited only by the boundary of not violating the similarly specified autonomy
of another. It is unclear, however, whether recognition of the fullest and widest possible
autonomy is required by responsiveness to someone as a value-seeking self. ... [perhaps]
rights need extend only so far as to constitute an adequate domain of autonomy.77

So your rights mark off what is to count as your domain of autonomy;
everybody’s acting within their rights “opens up” the domain of autonomy to be
enjoyed by each and every one. While Nozick doesn’t use the predicate “is
autonomous”, then, we can construe his position on autonomy like this: a person
ought to have the domain of autonomy — an “area” of action which is his only
— that is constituted by the person’s rights, regardless of whether he has a
capacity for functioning autonomously or not (regardless of whether the
“traditional proposal” about moral agency holds true or not). So while “To be
“autonomous” is (literally) to be self-legislating or self-regulating.”78, whether
you really are or not is insignificant; what’s important is that there be a domain
of autonomy within which you can do as you like — whatever your motivation
for doing what you choose to do within that domain. No Kuflik holds that, “A
person who determines his actions in accordance with principles he has
mindlessly borrowed from others is not self-regulating at a sufficiently deep
level. A person who simply does whatever he happens to want to do is not self-
regulating at all.”79 Let us, for the sake of argument, grant that this description is
a true one (and let us ignore the opacity of the expressions “mindlessly
borrowed” and “sufficiently deep level”, expressions that are not made very
transparent by Kuflik anyway). So what, Nozick would respond; none of that will
have any bearing upon the person’s right to a domain of autonomy as constituted
by his rights.

To summarize: On the Nozickian position, to speak of a person’s autonomy,
“is not to describe the person (e.g., as mature, reflective, or independent); it is to
grant the person a right to control certain matters for himself or herself. The
operative analogy here is with autonomous nations. They may not be especially
wise of well governed, but they have a right to determine their internal affairs

76 Kuflik, “The Inalienability of Autonomy”, 272, fn2; italics mine.
77 Nozick, Philosophical Explanations, 501-502. (On the notion of “a value-seeking self”, and on its
relation, according to Nozick, to Kant’s Second Formula, see ibid., 462.)
79 Ibid.
without outside interference of various sorts." A which would be the "certain matters" a person may control for himself on the Nozickian position? Matters consistent with his self-ownership.

Thus Nozick would, for example, reject Parfit's position on autonomy as inconsistent with self-ownership: "Autonomy does not include the right to impose upon oneself, for no good reason, great harm. We ought to prevent anyone from doing to his future self what it would be wrong to do to other people." Indeed, we may not so prevent a person, Nozick would respond, whether he has "good" or "bad" reasons, or no reasons at all, for harming himself. For what Parfit is advocating, he would say, is a not consented to boundary crossing of people's rights "for their own good or protection." (ix) But since only "Voluntary consent opens the border for crossings." (58), Parfit's proposal is not, in effect, "just" a proposal that we violate rights: it is also one which tries to legitimize "paternalistic aggression." (34) "Respecting people's autonomy," says the Kant scholar Thomas E. Hill, Jr., "requires resisting the temptation to "take charge" of their lives without their consent, ..." Apparent Parfit can't resist that temptation. Nor can the libertarian Jan Narveson.

§ 62: The libertarian Jan Narveson on "nonautonomous motivations" and "normal autonomy"

In the academic world, libertarianism is indissolubly associated with Nozick's name (though he is no longer a libertarian, we noted in § 5). But there are other prominent academic philosophers known as libertarians. One of them is Jan Narveson, whose main work is The Libertarian Idea. It is worth considering here for two particular reasons. First, it could be claimed that it "follows Nozick in providing insightful discussions on rights, property, the market, and libertarian policies." Second, and more important to my argument at this particular stage, in it Narveson tries to justify a position compatible with what I have called a general (or limited) nonpaternalistic position. Thus his position may be taken as a critique of Nozick's totally (or unlimited) nonpaternalistic position — though it is not intended to be.

Narveson presents the issue of nonautonomous choice related to what he names the problem of "nonautonomous motivations": that a "normally autonomous" person A in a particular situation appears to be acting under the influence of what we take to be "nonautonomous motivations". In the language I myself have hitherto employed: A is in S₁ — i.e., in the particular situation — not the best judge of his own interests (anymore), but we happen to be. How did we come to possess the knowledge necessary to judge about that in S₁? We have this knowledge, says Narveson, because A beforehand told us what his "highest motivations" are, and what A does right now (in S₁) conflicts with these motivations — conflicts with his "view of the good", as Narveson puts it. Therefore, he argues, we may legitimately interfere to end that conflict:

A might be drunk, for instance, or acting thoughtlessly, or contrary to what A has previously represented to be A's own best interests. Does the right to liberty that libertarianism posits permit or forbid interference in such cases? The matter can be very tricky in particular cases, but the general principle, it seems to me, is clear enough. ... we should act toward person A on the basis of what A has given us to understand are A's highest motivations: A's view of the good, and not simply A's current desires. Not easy advice to follow in practice, and especially difficult where the question is whether interference is justified by the State or by miscellaneous persons as distinct from friends. But the rationale is clear enough: we want to respect A's liberty, and when A is autonomous, person A wants to be identified by these higher level, reflected-upon values.

What does it mean that A wants to be identified by his higher values "when A is autonomous"? A person is normally autonomous, Narveson holds, when he is capable of exercising "critical competence". Here he relies on Lawrence Haworth's description of this sort of competence in Autonomy, in which Haworth writes: "Having critical competence, a person is first of all active and his activity succeeds in giving effect to his intentions. Having critical competence, the active person is sensitive to the results of his own deliberations; his activity is guided by purposes he has thought through and found reasons of his own for pursuing. Normal autonomy is critical competence." So "normal autonomy" is identical with critical competence.

80 Hill, "The Importance of Autonomy", 48. Hill doesn't apply this description to Nozick's position, but I find it appropriate for that position.
81 Parfit, Reasons and Persons, 321.
82 Hill, "The Importance of Autonomy", 49; italics mine.
83 Child, "Can Libertarianism Sustain a Fraud Standard?", 724.
84 Narveson, The Libertarian Idea, 17.
85 Quoted from ibid., 16.
§ 63: Critical assessment of Narveson's views

Evidently, the idea of normal autonomy/critical competence is but a vague idea of conscious, independently chosen, goal-directed activity. Now few would say that a person who is "unconscious", always does what others tell him to do (i.e., is "dependent"), and just acts on whim without an eye to the future deserves the label "autonomous". (Kuflik would say the person is neither self-regulating nor self-regulating.) But then what Narveson's description of autonomy states is quite obvious. It is also quite obvious that most will agree with him that "autonomy is plainly ... a matter of degree and indeed one with no clear upper bound; ...", and that there nevertheless is such a thing as "a normal level of autonomy"; and that "what to do about those below the line will be a specific problem", ..."86 Given Narveson's rather common-sense understanding of autonomy, the content of the claim that, "when A is autonomous, person A wants to be identified by [his] higher level, reflected-upon-values" isn't very clear in a philosophical context.

And to the extent that it is clear, we may ask why the fact that A is autonomous should in itself entail that he wants to be identified by his "higher level, reflected-upon values". My reasons for asking this question are as follows: As examples of grounds for interference Narveson lists the grounds that A is drunk, acts "thoughtlessly", or acts contrary to his previous conception of his own best interests. Now I will argue that the normally autonomous person A can have good reasons for changing his mind about his "higher level, reflected-upon values" the way he sees it. Perhaps he, for various reasons, now regrets telling us about his "view of the good". (If A is a politician this is more likely: there's a saying that "a politician's worst enemies are his former statements." Or perhaps he has just recently experienced some sort of conversion, an experience that caused him to replace his fundamental value set overnight; that is, all of a sudden. Or perhaps A has come to the conclusion that heavy drinking makes the world a more interesting — or less dull — place to live. Or perhaps he believes that heavy drinking, by blurring things, helps to keep the world's sufferings — for which he holds himself, being a relatively rich Westerner, largely responsible — at a distance so that he won't be so sad as he usually is because of this; so

86 His idea of responsibility here might be due to the fact that he rejects, because having come to see the falsity of, "everyone's favorite moral conviction, namely, that there is nothing seriously wrong, morally speaking, with the lives we lead." Pogge, 'Realizing Rawls', 36, fn30.

88 It's amazing to observe how far some people go in the direction of letting fate decide. (Alternatively: of letting statistical probability "decide"). For instance, in Germany young males, to demonstrate their manliness, steal cars equipped with driver's airbags — a device designed to provide the driver with a "soft landing" in the event of a front collision (some cars come with sidebags too) — and deliberately crash the cars into walls or into one another. (So-called "airbagging"). The thrill here — or, if you like, the "fate aspect" — is that the airbags might not eject, in which case the risk of being killed is much higher. (Driving on U.S. highways one is constantly reminded of "Buckle up!" by street signs bearing those words. May one take the high frequency of such street signs to be an indication that the average American, in refusing to fasten his seat belt, prefers to let fate decide whether he'll make it home alive or not?) Another true story: In Lebanon, according to Newsweek, guerrilla fighters in their leisure time engage in voluntary Russian roulette. (Is not bringing and not using a condom when having sex with strangers, or with people one "knows", contemporary people's "modern" way of playing Russian roulette on themselves? Is smoking cigarettes?) It may also be considered a way of playing "voluntary Russian roulette" on others? At any rate, the large and steadily increasing numbers of people with HIV [and thus with AIDS at a later stage] could be taken to show that an awful lot of people let fate decide as far as they themselves are concerned — and sometimes as far as their families are concerned too; some husbands contract HIV from prostitutes and then infect their wives and, eventually, sometimes their children through spills of blood.)
autonomous, on Narveson’s understanding of autonomy, is insufficient ground for thinking that A wants to be identified by his “higher level, reflected-upon values” as previously presented by himself. This is however not tantamount to saying that when autonomous, A does not want to be so identified; that there is no connection here. Surely there might be. But just as surely there might not be. Accordingly, if there appears to be no connection that cannot automatically be taken to mean that A is under the influence of “nonautonomous motivations”. Suppose A turns up drunk or, despite being a father of seven with the commitments that go with it, acts “thoughtlessly” by engaging in dangerous “base jumping” (parachuting from fixed points like sky-scrapers, bridges and mountain tops[89]), or by signing a contract to join the French Foreign Legion to become a mercenary[90], or somehow acts contrary to his previous conception of his own best interests. Though A, whom we know well, in all of these cases might seem “to be acting under the influence of what we take to be nonautonomous motivations”[91], we could be wrong simply. A could be knowing exactly what he

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[89] In Norway, a mountain called “Trollvegen” (“The Troll’s Wall”) has for some years now attracted parachutists from all around the world. Jumping from this mountain is particularly dangerous due to side winds, so many have died because blown straight into the very steep wall beneath the mountain top. One year an American couple arrived, and the husband went for the first jump. Unfortunately he became prey to the side winds. The next day his wife — now his widow — jumped too. (Were they both “acting thoughtlessly” because under the influence of “nonautonomous motivations”?) Today there is a law forbidding base jumping in “Trollvegen”; the authorities didn’t want to pay for expensive and dangerous rescue operations any more. (Operations that involved flying a helicopter very close to the mountain wall — rotor blades only meters away — and having tumbling stones coming down at the helicopter’s roof.) Given Nozick’s position, anyone is, equipped with a parachute — or with none at all — free to throw himself alongside any mountain as long as he first signs a contract saying he will cover the rescue costs himself posthumously by giving access to his bank account, if it comes to that), and as long as the rescuers voluntarily choose to risk their lives for money — as some rescue workers would gladly do since they just love the adrenaline “kick” they get from participating in dangerous rescue operations (one of them has told me). (Alternative descriptions of the situation are of course possible: For instance, a person might have to rent the mountain from its owner in order to jump — perhaps the owner sells tickets to parachutists standing in line to jump — and rescue workers may volunteer to pick him up, “dead or alive”, for free should he fail.) Also, a jumper is at liberty to agree that no rescue efforts should be made at all.

[90] We here have a real-life example fitting Nozick’s nonpartisanist position perfectly: In France, the law allows people to “sell themselves into (military) slavery” by signing an irrevocable contract with the French Foreign Legion saying they are at liberty to leave for the next five years. (The degree to which they may sell themselves is also seen in the fact that their name and personal and social security number get eradicated as they enter the contract; in their place, they are given an enrollment number. Furthermore, they’re given a new “fatherland”; namely, the Legion as such.) Now legionnaires sometimes, after a few weeks of grueling exercise, regret signing the contract. But as there is “no way out” legally speaking, they literally find their own way out by fleeing the Legion. If the defector is caught by the police within the borders of France he is brought back to the camp — facing severe punishment, or “torture” as some, having undergone the punishment, prefer to call it.


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§ 64: More on “paternalistic aggression”: why Nozick would reject Narveson’s position

To Nozick, the fundamental problem with this general (or limited) nonpartisanist position — indeed, with any such position — will be that it legitimizes interference with A against his will. For even should A in S1 insist that his drinking, etc., though in apparent conflict with yesterday’s values, is not due to “nonautonomous motivations”, others, thinking A has got it all wrong when saying this, may legitimately interfere and so disrespect his present will. Consider this question: What would Narveson say to those prepared to interfere because they refuse to believe in A’s story about his sudden conversion, to those who confiscate B’s bottles of whisky to keep him sober — i.e., they reject B’s “new” values in favour of drinking, to those so horrified by C’s “thoughtless” conduct that they act to stop him, and who all argue that A, B and C ought to be interfered with because their acts are the products of “nonautonomous motivations”? He would have to applaud their action, since “the rationale [for interference] is clear enough: we want to respect A’s liberty ... by respecting (or, rather, trying to respect) A’s own values, which after all are a function of A’s freedom to form those values.”

Though kindred spirits, the libertarians Narveson and Nozick differ starkly over the issue of paternalism. In fact, Nozick would say that Narveson’s position in The Libertarian Idea legitimizes “paternalistic aggression”, which, we saw at the beginning of the present chapter, is defined by Nozick as “using or threatening force for the benefit of the person against whom it is wielded.” (34)

For that is exactly what Narveson says: in particular instances we may interfere with a person’s acts for the benefit of the person. In other words: we may use force against him.

§ 65: Forcing people to be free?

In reflecting upon what reasons may be given to back the side-constraint view (interpretation) of individual rights, Nozick writes:

The particular moral content gotten by this argument [from moral form to moral content], which focuses upon the fact that there are distinct individuals each with his own

[92] Ibid.
life to lead, will not be the full libertarian constraint. It will prohibit sacrificing one person to benefit another. Further steps would be needed to reach a prohibition on paternalistic aggression: ... For this, one must focus upon the fact that there are distinct individuals, each with his own life to lead. (34)

An individual is "distinct" (34) or "a separate person" (33) and, realizing that he is a separate person, we should never forget "that his is the only life he has." (33)93 So he is to be in charge of his life — and no one else is: "Treating us with respect by respecting our rights, [the minimal state] allows us, individually or with whom we choose, to choose our life..." (334) (Cf. "I did it my way"). Compare with Kant here: "No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law — i.e. he must accord to others the same right [Recht] as he enjoys himself."94

Of course, Narveson in no way disagrees with what Kant says here. The fact remains, though, that he thinks a person may be compelled "to be happy in accordance with" his own previously stated conception of his welfare. Now Narveson could (and quite possibly would) respond to the charge that he defends paternalistic aggression by arguing that respect for persons is precisely his concern too; that by respecting A's liberty one is definitely respecting him as a person; that by taking A seriously as regards his own previously stated values, I am respecting the liberty which made it possible for him to form those values in the first place. "I do not", says Narveson, "in principle, impose my values on A in the process..."95

It is not clear to me that imposing A's values on A is compatible with respect for A's liberty. This argument seems quite unlibertarian — if not antilibertarian — since it looks as if Narveson thinks a person may be "forced to be free"; that in forcing him not to give in to his "occurrent desires" one is safeguarding his freedom by setting him free from the desires of the moment. (Nor, for that matter, is it clear that J. S. Mill [of whom many would say that he is liberalism's Grand

93 But, one might ask, is this a reason for forcing the young woman in Pogge's example to live up to her contract — or is it not rather a reason against this? If we place emphasis upon the fact that her is the only life she has, the more important it seems to secure that this only life is a good one. Cp. my concluding remarks in § 93.

94 Kant, Über den Gemeinspruch, 290/74.
95 Narveson, The Libertarian Idea, 17.
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Perhaps he tells us, when we express the opinion that it’s for his own good that he retains his liberty, that, “No thanks. Instead of being “blessed” with having liberty, I’d rather be a happy slave.” 97

A summary of the Nozickian position at this point may be given in the form of the following numbered list:

1. Self-ownership is constituted, or “made up”, by A’s LHPL-rights of noninterference, to say that A owns himself is to say that A owns these rights. (Cp. § 33 above.)
2. Anything A owns legitimately may be transferred as A wishes.
3. Therefore A may let go of (transfer) his liberty.
4. For Nozick, showing respect for A’s (negative right to) liberty is only a necessary condition for treating A as “a separate person”. (33)
5. By contrast, showing respect for A’s self-ownership is both a necessary and a sufficient condition for treating A as a separate person.
6. The reason for 5. is that it also “takes care of” A’s principal opportunity, following self-ownership, to quit his liberty; 5. implies that one respects A’s right to liberty (the necessary condition) and A’s right not to have any liberty (the sufficient condition).
7. Were one to disrespect A’s right to have no liberty one would be acting paternalistically against A. (“You have to have rights, whether you like it or not.”)
8. Treating individuals as separate persons means realizing “that there are distinct individuals, each with his own life to lead.” (34)

97 When one speaks of a “consenting slave” that sounds like happy slave, idyllic and conflict free — and might also be so in some cases (empirical evidence showing it to be). But of course it need hardly be so. For example, my (regretting) French Foreign Legion (military) slaves are far from happy (which is why they try to flee the Legion); cf. footnote 90 of this chapter. Probably the seemingly voluntarily consenting female slave in Pogge’s example isn’t too happy with her situation either — presuming, that is, she isn’t a complete masochist, in which case this would perhaps an example of “sadism (on consenting masochists)” (123). Apparently, some people in the real world do live as consenting slaves in SM-relations and are happy with that: they describe themselves as “sexslaves” — being whipped, burned with cigarettes, tied up in painful positions, urinated upon, etc. — and assure us that they wouldn’t want any other sort of life. The most extreme masochists sometimes get killed even due to too severe “treatment” from their sadistic masters (too much lashing, and so on); things just got out of hand — and the consenting masochist was fully aware that they might some day. As for the world of fiction as regards the phenomenon of happy slaves, a Spanish film portrays beautifully the story of a law professor who sells himself into slavery — though not a very severe form of slavery. One day, the old professor knocks on a former student’s door, now a very successful, rich lawyer. At first the former student is both surprised and glad to receive his visitor. (”It is a great honour . . . , etc.) The professor then goes on to tell him the reason for his visit: he wants to sign a contract with the lawyer saying the lawyer is to be his master. The lawyer is astonished and wants to reject the offer. (To him it’s “an offer he must refuse”, it seems.) But after hearing the professor’s arguments as to why he wants him to be his master, and after some persuasion, the lawyer gives in and signs the contract. The professor has reached retirement age, and his pension is so low that he can’t afford a house big enough to make room for his huge library of law books. Therefore he offers to sell himself to his former student as a kind of all-round “butter” or, in the language of the professor himself, as “a slave”, on the condition that his library is taken well care of by the lawyer in his very large house.

9. Every forced interference with (or forced action against) A’s self-regarding acts — i.e., interference not consented to by A in advance — violates A’s “separateness” by not respecting his self-ownership.
10. Action that violates A’s separateness, “does not sufficiently respect and take account of the fact that . . . his is the only life he has”. (33)
11. Forced interference with A’s self-regarding acts qualifies as “paternalistic aggression” (34) against A’s self-ownership; things are done to A against his will and for the benefit of A.

As Narveson advocates interference with A’s self-regarding acts whenever A is under the influence of “nonautonomous motivations” — “to respect A’s liberty” — he cannot escape the charge that he thereby advocates paternalistic aggression against A. He is prepared to allow the use of force for the benefit of A; A will benefit from his acting according to his previously stated “higher level, reflected upon values” instead of giving in to his “occurrent desires” — something we, using or threatening force, won’t let him do.

The kind of interference we’re speaking of here would, then, on Nozick’s account, implicitly “involve a shift from the classical liberals’ notion of self-ownership to a notion of (partial) property rights in other people.” (172) But there are no such rights (we have seen). Hence there can only be one kind of legitimate interference: the state’s interference with people and organizations interfering, or threatening to interfere, with other people’s rights of self-ownership. (Watch out, Narvesonians of the world!) The libertarian state’s interference then simply helps to see to it, in the words of Kant, that any person “accord[s] to others the same right [Recht] as he enjoys himself” 98, so that his actions “can coexist with everyone’s freedom in accordance with a universal law”. 99

§ 67: On selling yourself into slavery or “tying yourself to the paternalistic mast” so that you won’t

Not seldom states, persons and various organizations produce arguments to the effect that things should be done to individuals “for their own good”, and swear they have the “best of intentions” in forcing another to perform, or in forcing him to abstain from performing, this or that self-regarding act. But whatever conception of the good or whatever (good) intentions others have, we have seen, Nozick would say they are not justified in such forcing.

98 Kant, Über den Gemeinspruch, 290/74.
99 Kant, Rechtslehre, 230/56.
An individual may, though, exactly because he owns himself, authorize others (the state, say) to take control over his life to the degree he chooses to have it controlled. Consequently, to the degree to which he chooses to have it controlled, to that degree he may “give away” his self-ownership. For instance, “persons who want to be paternalistically regulated [may contract] into particular limitations on their own behavior or appointing a given paternalistic supervisory board over themselves.” (14) Put otherwise: self-imposed paternalism is — and this we have already seen in some detail — consistent with self-ownership. And so is self-imposed slavery — a slavery that may be only partial or total. In Chapter 9 is told the tale of how a minimal state develops, through legitimate steps, into a more-than-minimal state which is a “system of demokesis, ownership of the people, by the people, and for the people, ...” (290) This system, he speculates, will perhaps be a system of partial slavery only: “Perhaps no persons completely sell themselves into slavery,...” (283; italics mine) Selling yourself into total (complete) slavery means that others, in principle, exercise unrestricted control of your life: your self-ownership is lost (i.e., given away) forever in that others by legitimate means establish full property rights in you. Though others thereby need not treat you as a mere “thing”, they may: “For Nozick, slavery involves total and unlimited perpetual unfreedom. Slaves have no control over their lives, and are legitimately subject to every conceivable form of sadistic or sexual perversion — may be worked to death, eaten alive, tortured, and so forth.” But, as we just saw, for Nozick slavery also involves “partial and limited perpetual unfreedom” within the system of demokesis.

Now, from a psychological point of view, some people are more liable to use their self-ownership to give it away either partially or totally: they might want to hurt or punish themselves; might be neurotic (abnormally sensitive, easily excited); might be suffering from compulsive ideas and so perform compulsive actions; might be masochists — cp. “sadism (on consenting masochists) ...” (323; italics mine) — and so on and so forth. In short, their self-control is no good. Such people may fear themselves; they’re not sure they’ll not do things to themselves, through the voluntary signing of irrevocable contracts, that they will regret enormously. (Therefore they will also fear others who are willing to enter irrevocable contracts with them. Yet these others do not thereby constitute a threat to them; they [the others] do not violate their rights or do anything against their will. And: “others cannot reasonably be restricted to counteract a person’s fear of himself?” (68, fn) In sum, then, to some “it may be quite a burden to be free (by having the liberty to sell oneself).”

How to cope with this problem? Nozick suggests that, “Anyone who worries that under [a system of allowing any acts that have the prior consent of the person whose boundary is crossed] he foolishly might consent to something can ensure that he won’t via voluntary means (contracts, and so on); ...” (67-68, fn) You may tie yourself to the mast, then — others may not do so against your will; they are not justified in determining in advance what you ought to will in the future. In other words: You will in S1 that your will in S2,... should be interpreted (by the other party to the contract) as “the will of S1” — i.e., as what you now believe you ought to will in the future — regardless of whether your will in S2 conflicts with your will in S1 or not. Thus you authorize others to do certain things to you in the future according to your present will. The following example, drawn from Parfit, may serve to give content to my formal presentation here:

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The Nineteenth Century Russian. In several years, a young Russian will inherit vast estates. Because he has socialist ideals, he intends, now, to give the land to the peasants. But he knows that in time his ideals may fade. To guard against this possibility, he does two things. He first signs a legal document, which will automatically give away the land, and which can be revoked only with his wife’s consent. He then says to his wife,
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'Promise me that, if I ever change my mind, and ask you to revoke this document, you will not consent.' He adds, 'I regard my ideals as essential to me. If I lose those ideals, I want you to think that I cease to exist. I want you to regard your husband then, not as me, the man who asks you for this promise, but only as his corrupted later self.' Promise me that you would not do what he asks.'

But what about the person who doesn't worry "that under [a system of allowing any acts that have the prior consent of the person whose boundary is crossed] he foolishly might consent to something", and who therefore might foolishly come to consent to something he will regret very, very much — a slavery contract, say? ("What an idiot I am! How could I do such an irrational thing? Nothing to be gained by wondering about that, though; now it's too late.") I cannot see how Nozick could cope with that problem. But since he obviously "doesn't care" about self-inflicted consequences or about a person's state of mind as long as it doesn't make him dangerous to others (I have noted), he might not see it as a "problem" — though it of course will be for the person in question. It might also be thought of as "no problem", on the Nozickian conception, for the following reason: "The loss of freedom suffered by a slave ... came about pursuant to free choice (whether rational or otherwise) ... It would be paternalism pure and simple to second-guess or disallow such choices." In other words: to Nozick, paternalism would be the problem were one to take seriously my objection. But then one is tempted to ask whether a position which is willing to pay that high a price for not being paternalistic isn't itself objectionable.

In any case, the minimal state is obliged to enforce contracts, and unless the master voluntarily releases his slave from the contract (because he feels sorry for him, perhaps), the state can't but force the fool into living up to the contract. Therefore, the way he experiences things, there is nothing worse than the libertarian minimal state. So it may be quite a burden to be a citizen of that state. Or, perhaps, a child of (voluntary) slaves:

a slaveholder would find it easy to make the children of his slaves his property: When such a child comes of age (before she can make any disabling contracts), he can threaten to mistreat her parents if she will not give herself over as a slave. He also has every opportunity to determine her upbringing, to mold her abilities, desires, and ambitions so that she will accept slavery rather than be chased away from the only place she knows. The children of slaves, at the very least, are likely to be much better off without the

107 Parfit, Reasons and Persons, 327.
108 Fogge, Realizing Rawls, 49; italics mine.

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option of selling themselves, ...

I do think that such threats aren't objectionable on Nozick's conception of rights. For the threat is not directed against the former child having now come of age (a threat against her would of course be illegitimate), and those towards whom it is directed have already opened up their border for crossings (cp. 58) — or, as I noted in § 42, it seems more appropriate here to say that there is no longer a border to be crossed since the vountary contract implies its removal. Also, this description is compatible with what I said in § 44 on children's rights: it is not clear in Nozick what sorts of rights children have, nor is their extension, but in this case it isn't a matter of a child facing pressure to sell herself anyway.

§ 68: The "Odysseus Solution" and Nozick's "Paternalistic Supervisory Board Solution"

Basically, I think, what Parfit's Russian did is what Odysseus did: he knew what the Sirens' song would do to him, i.e., cause him to do, and so he had himself tied to the mast to prevent himself from doing what he would otherwise do; namely, stop his ship and go ashore to join the irresistible Sirens. We may therefore call this the Odysseus Solution.

Structurally speaking, the Odysseus Solution resembles what you do if you tell doctors to disconnect you from life saving machinery should you ever become so injured that state S — a state of permanent coma, say — is realized. For in such a state, you now reason, you wouldn't wish to go on living. Since when in a coma you won't be able to consent to the disconnection you make that decision right now. Though structurally similar to the Odysseus Solution, there nevertheless is an important practical difference here: unlike Odysseus, you can't utter a sentence to contradict your former decision. Which is what Odysseus did in pleading the crew to untie him so that he could go ashore. But, as we know, they refused, sticking instead to Odysseus' original orders not to take notice of future orders to be set free: "He may even claim to have changed his mind but since it is just such changes that he wished to guard against [the crew is] entitled to ignore them." The precise structural similarity then appears to be this one: in both cases a person decides in advance what others are to do to him in a particular situation.

109 Ibid., 50.
110 Dworkin, "Paternalism", 77.
Nozick explicitly states that while a free system would allow an individual to sell himself into slavery, "It also would allow him permanently to commit himself never to enter into such a transaction." (331; italics mine) This he may do by tying himself to the mast; he may appoint "a given paternalistic supervisory board over [himself]" to keep himself from entering into such a transaction, perhaps because he is afraid that "he foolishly might consent to" such a transaction. In short, "he can ensure that he won't enter into such a transaction "via voluntary means (contracts, and so on)". His present will is then "locked" or "frozen" so as to represent his future will too. Accordingly, Nozick's version of the Odysseus Solution is what we may call his *Paternalistic Supervisory Board Solution*. Both represent voluntary contracts by which an individual ties himself to the mast in order to enjoy self-imposed paternalism. Doing so may even sometimes be interpreted as the *rational* thing to do: "Under certain conditions it is rational for an individual to agree that others should force him to act in ways in which, at the time of action, the individual may not see as desirable."111 Perhaps the Nineteenth Century Russian behaves rationally in this sense.112

§ 69: Kant vs. Nozick: Kant on the inalienability of rights

If you opt for an irrevocable contract involving total slavery — if you tie yourself to a master rather than to the mast — it is, according to your will, another's will that is functioning instead of (what it is difficult any longer unrestrainedly to call) "your will".113 In holding such contracts to be legitimate, Nozick runs counter to prominent thinkers in the liberal tradition: "Philosophers otherwise as divergent in their views as Locke, Spinoza, Rousseau and Kant, all subscribed, in one form or another, to the following thesis: no agreement by which a person places himself wholly and irrevocably at the disposition of someone else's will is valid or binding."114 In the *Rechtslehre*, for instance, Kant says:

111 ibid.
112 I like with the notion of voluntary rights violations, it might be thought that there is a parallel problem of intelligibility with regard to the notion of voluntary (i.e., self-imposed) paternalism. Is a right really violated if you consent to its "violation"? I asked in § 42, what is there to violate after your consent has removed the right? Here we can ask: if you consent to being paternalistically regulated, isn't it, basically, you that is in charge? After all, things are being handled the way you would like to see them handled. If told by my son of age four to act paternalistically towards him (something he would of course never tell me to do!), who would be in charge?
113 Or isn't it? C.f. the remarks in the footnote right above this one (112).

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A parallel passage in *Über den Gemeinspruch* states that, "no-one can voluntarily renounce his rights by a contract or legal transaction [rechtliche Handlung] to the effect that he has no rights [keine Rechte] but only duties, for such a contract would deprive him of the right to make a contract, and would thus invalidate the one he had already made."116 And subsequently: "No-one who lives within the lawful state of a commonwealth [rechtlichen Zustände] can forfeit" the following kind of equality: that he is "allowed to practice coercion as long as he "himself [is] subject to coercive counter-measures from others". (If only he were so allowed, he "would ... be more than their fellow-subject.") He cannot forfeit this equality,

other than through some crime of his own, but never by contract or through military force (occupatio bellus). For no legal transaction [rechtliche Tat] on his part or on that of anyone else can make him cease to be the owner of himself [Eigner seiner selbst]. He cannot become like a domestic animal to be employed in any chosen capacity and retained therein without consent for any desired period, even with the reservation (which is at times sanctioned by religion, as among the Indians) that he may not be maimed or killed.117

Note that servants are not slaves in Kant's sense, for although the former category of people, "are included in what belongs to the head of a household ... he can never behave as if he owned them (dominus servi); for it is only by a contract that he has brought them under his control, and a contract by which one
party would completely renounce its freedom for the other’s advantage would be self-contradictory, that is, null and void [null und nichtig], since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force.”

Kant’s talk of the possibility of losing one’s equality due to some crime one commits shows that, after all, the state’s nonvoluntary enslavement of a thief is legitimate: the state is entitled to have the thief’s “powers for any kind of work it pleases (in convict or prison labor) and [the thief] is reduced to the status of a slave for a certain time, or permanently if the state sees fit.” So whereas you cannot become like a domestic animal by your own choosing, the state can, if it “sees fit”, turn you into such a creature if you, desperately longing for slavery, choose the “means” of becoming a thief in order to achieve that “end”. (The catch is, however, that this reduces your range of possible masters down to just one; i.e., the state.)

The talk about the rights renouncing contract invalidating itself seems like a poor argument. Surely, my signing such a contract would deprive me of the opportunity of entering future contracts (since I also lose the right to enter contracts). But since I am free when I sign this contract, how come it’s not valid after I have signed it? (So it is not easy to see how Kant’s conclusion follows here.) But there are other problems too. For instance, in the light of Kant’s violent attack on paternalism, doesn’t the prohibition on slavery contracts itself smack of paternalism; does Kant fail by his own standards? True, such contracts will imply violation of duties of virtue; especially those duties the Second Formula demands for. But recall (from Ch. I) the deep cleavage — as well as the crucial interconnections — between morality and legality in Kant: things a person morally oughtn’t to do to himself the state may not legally enforce him into not doing to himself. Otherwise, the state will be a regimen paternale. Thus, although a person oughtn’t, “like South Sea Islanders ... let his talents rust” the police may not imprison him for doing it, refusing to set him free unless he starts developing his talents. So if it is true, as Kant says, that, “No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, ...” whence the legitimacy of the state’s denying me to become a happy slave?

In the next sentence, Kant invokes an important constraint upon individuals’ pursuit of individual happiness; namely, that a person may do as he likes “so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law — i.e. he must accord to others the same right [Recht] as he enjoys himself.” In other words: your acts must not violate the universal principle of right, stating that, “Any action is right [recht] if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice [Willkür] of each can coexist with everyone’s freedom in accordance with a universal law.” Now your act of selling yourself into slavery, if universalized, will mean the eradication of freedom as such, this “only original right [ursprüngliche Recht] belonging to every man by virtue of his humanity [kraft seiner Menschheit].” (Let us ignore the problem created by the mere fact that there must at least be one person abstaining from selling himself; namely, the master of everyone else.) But does the imagined universalization of the act, with the resulting (universal) destruction of freedom, show it to be a violation of a duty of justice? Can’t we think of a juridical state in which slavery is both permitted and enforced? Unless one can argue that the act of selling oneself into slavery does violate a duty of justice it is not apparent that Kant should disallow the act.

At this point I feel tempted to say with Nozick (what he says in connection with a quite different topic) that, “Since I do not see my way clearly through these issues, I raise them here only to leave them.” (323) So be it. In any event, as it stands, as far as the abdication of rights is concerned, Kant’s political philosophy flies in the face of Nozick’s political philosophy as Kant

\[118\] Kant, Rechtslehre, 283/101. (How can my ceasing to be a person have the effect of relieving me from keeping the contract, must it be the case that the responsibilities of an individual no longer a person in the legal sense simply vaporize?)

\[119\] Kant, Rechtslehre, 333/142; italics mine. Adds Kant: “If, however, he has committed murder he must die.” Ibid.

\[120\] Would the prohibition on slavery contracts within a Kantian state have the effect of turning hard (as opposed to “soft”) masochists into thieves (turning themselves in immediately after stealing) as this is the only chance there is of getting any satisfaction as far as their best for slavery is concerned?


\[122\] Kant, Grundlegung, 423/31.

\[123\] Kant, Über den Gemeinspruch, 290/74; italics mine.

\[124\] Ibid.

\[125\] Kant, Rechtslehre, 230/56.

\[126\] Ibid., 237/63. I treated Kant’s conception of Naturerecht and his concept of a natural right in § 13.
unambiguously states that, "everyone has his inalienable rights [unverlernbaren Rechte], which he cannot give up even if he wishes to, ..." This statement, at face value at least, can hardly be taken as anything else than a rejection of (what I have throughout called) Nozick’s anything-formula (at 58). As far as the issue the inalienability/alienability of rights is concerned, then, Kant appears to be no friend of Nozick’s. If that is true, we have detected a particularly clear instance of what’s not Kantian in Nozick.

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**IV**

The State in Nozick and in Kant

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“The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled.”

— Robert Paul Wolff, *In Defense of Anarchism*

§ 70: “How to back into a state without really trying”

Nozick thinks that he can demonstrate how a minimal state of the kind he envisages could grow out of a state of nature situation as depicted by John Locke in his *Second Treatise* — “even if no actual state ever arose that way.” (7) Besides, “We learn much by seeing how the state could have arisen, even if it didn’t arise that way.” (9)

The “could” here requires some explanation. What does Nozick mean by it? Suppose I said the following: “It could happen that the sun, contrary to all the predictions and theories of physics, in five minutes melt away completely, causing immediate darkness and extreme temperatures below zero, thereby eradicating all life on planet Earth.” It could. Is Nozick’s story about the rise of the state of an equally hypothetical nature — is it what one may call a *theoretical* could only? (Theoretically, just *anything* could happen in our world, it seems.) It will be thought that if it is, then, “Surely the state could have arisen the way Nozick imagines. But in being so far-fetched, the story’s relevance to our condition is nil.” Now, in Chapter 9, Nozick speculates about how a more extensive state than the libertarian state could come about. Actually, he
speculates about a possible continuation of the story up onto the libertarian state, i.e., how one could go beyond that state to the system of “demoktikis” (which we have encountered in a couple of sections of Chs. II and III). There can be no doubt that Nozick employs an empirical could in this connection. For the continuation is a (in part ironic) criticism of our modern states; and what critical bite would that criticism retain if it were a piece of science fiction? (That is not to deny, though, that the story is pretty “wild” and amusing.) Accordingly, it is plausible to hold that the story preceding this one — i.e., the story of the emergence of the libertarian state — hinges on an empirical account too.

Then what is the story of the minimal state? In the state of nature situation in both Locke and Nozick, people do generally respect “The Law of Nature” (which requires that one ought not to violate another’s LHP-rights; cp. our § 19 above.)

Now the explanation of how a minimal state could have arisen is marked by a very original feature: nobody ever intended to end up with a minimal state, yet through the workings of an “invisible hand” — a phenomenon known from economic theory and other fields of academic inquiry — that is exactly what will happen anyway. Which accounts for the subtitle of Part I: “how to back into a state without really trying”. That is: as long as rights are generally respected, and people act out of a concern for rational self-interest, then the invisible hand will produce the unintended outcome. And only then is the minimal state legitimate; for it to have legitimacy, it must evolve through a series of legitimate steps only — “by a process involving no morally impermissible steps, ...” (5)

The transition from the state of nature to the minimal state in Nozick follows a very complicated path — scattered alongside that path there are many sidetracks too — and it is not easy to get a totally clear picture of the entire process. Nonetheless, from a bird’s eye point of view, I propose the following summary of the transition:

In the state of nature everyone is his own judge in confrontations with other individuals. Accordingly, he will overestimate his own suffering and punish offenders too severely. This spins off a process of endless series of acts of retaliation, creating the problem of how to settle disputes. Also, individuals may lack the power to enforce their (first-order) rights — i.e., to punish, to exact compensation, and to defend themselves (self-defence). The remedy for the

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1 “I offer no explicit account of invisible-hand explanations, ...”, Nozick writes, but mentions sixteen examples of such explanations “to give the reader a clearer idea of what we have in mind when speaking of this type of explanation.” (20-21)

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practical problems embedded in the state of nature situation is the creation of mutual protection associations; people organize in groups to enforce their rights. The mutual protection association situation means fewer unreasonable disputes than in the “pure” state of nature situation because co-members are not, unlike the individual they are expected to help, blinded by self-love or passion and so will be reluctant to waste time and effort pursuing claims of little merit. A several-heads-are-cooler-than-one effect, if you like.

When everybody defends everybody within mutual protection associations, too much time and effort is used by too many people. (There are other things to do, many will think.) This practical problem is solved through a division of labour: entrepreneurs set up professional firms — commercial protective associations — from which people can buy protection services instead of engaging in time- and effort-consuming mutual protection associations.

Commercial protective associations compete to win customers. Since people want “the best protection money can buy”, the best supplier of effective protection will in time dominate the market; hence there emerges the dominant protective association. The realization of a dominant protective association — which might be the result of mergers, take-overs, founding of cartel, a federation of co-operating commercial protective associations, etc. — will have the effect of making people leave their now outrun commercial protective associations in favour of membership in the dominant protective association. I.e., the dominant protective association has managed to wean away customers from all its competitors. In this free market, then, Nozick claims, there is a tendency to monopoly.

Though the dominant protective association enjoys a unique position in the market for protection, some strongly individualistic people — so-called “independents” — choose to enforce their rights themselves, which is of course everyone’s natural right to do. The existence of these “Rambos” means that the dominant protective association only comes close to (falls short of) a de facto monopoly of legitimate violence; independents still act on their own, legitimately using violence: “The dominant protective association makes no ... claim to be the sole authorizer of violence.” (117)

Yet the dominant protective association will prohibit independents from enforcing their rights privately against its clients because it will judge such

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2 A situation with a few independents “might have arisen if native Americans had not been forced off their land and if some had refused to affiliate with the surrounding society of the settlers.” (54)
enforcements to be too risky to its clients. Just like with people generally in the “pure” Lockean state of nature situation, there is the risk that independents will overestimate their own suffering and hence punish the dominant protective association’s clients too severely in cases of conflict — even when independents say they will act according to procedures that the dominant protective association has approved of. That is so because they might fail, due to self-love, etc., to live up to procedures which the dominant protective association has accepted as legitimate. In short, “it is extremely risky to us all if there are people like John Wayne [i.e., an independent] around, particularly if one cannot be sure that they will always be motivated by calm reason.” So, in order to really offer its clients “the best protection money can buy” (which clients do of course demand) and to eradicate “general apprehension and fear” (66) in its clients (which they do of course wish most strongly), the dominant protective association chooses to neutralize independents by prohibiting them from exercising their natural right to enforce their rights. In so doing, the dominant protective association is turned into an ultraminimal state with a de facto monopoly of violence.

But matters cannot rest here, for independents must be compensated (somehow) for the prohibition. This due to the principle of compensation, which states that, “those who are disadvantaged by being forbidden to do actions that only might harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others.” (82-83) (It is worth recalling here that it is not clear why we should accept this principle as it is not derived “from deeper principles.” [87]) Thus those operating an ultraminimal state are morally required to transform it into a minimal state (cf. 119) — even should (instrumental) rationality tell them that this would contradict their self-interest. The most appropriate sort of compensation, Nozick argues, will be in the form of protection services for independents. When the ultraminimal state compensates independents in this particular way, it becomes a minimal state: it moves from the status of a de facto monopoly to the status of a de jure monopoly on force, and changes from offering protection to clients only to offering protection to all people residing within its boundaries.4

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3 Wolff, Robert Nozick, 46.
4 Which does not mean that this monopoly necessarily turns out to be the only body of people using force: “As Marshall Cohen points out ..., a state may exist without actually monopolizing the use of force it has not authorized others to use; within the boundaries of a state there may exist groups such as the Mafia, the KKK, White Citizens Councils, striking unionists, and Weathermen that also use force.”

Thus we have this “formula”, using obvious abbreviations, for the emergence of the minimal state: SN —> MPAs —> CPAs —> DPA —> [prohibition] —> UMS —> {compensation} —> MS.

Several criticisms of this process have been put forward, but I shall address none of these. Two remarks, though. First: “Undoubtedly, the least expensive way to compensate the independents would be to supply them with protective services ...” (110), Nozick claims. But is it really beyond doubt that all other ways of compensating are more expensive? Second: “The minimal (night-watchman) state is equivalent to the ultraminimal state conjoined with a (clearly redistributive) Friedmanesque voucher plan, financed from tax revenues. Under this plan all people, or some (for example, those in need), are given tax-funded vouchers that can be used only for their purchase of a protection policy from the ultraminimal state.” (26; italics mine) Notice that the state may not tax former independents’ legitimate holdings for receiving these vouchers, “Since it would violate moral constraints to compel people who are entitled to their holdings to contribute against their will, ...” (268) It is not clear (to me) that this won’t create a free rider problem: In order to not pay for protection, I simply insist upon being an independent. As I know very well, the ultraminimal state won’t let me remain an independent within the territory of its jurisdiction, a denial for which it must compensate me — and will do so by offering me protection services; i.e., I am given tax-funded vouchers that can only be used for the purchase of protection from it. Presuming I want protection for free — and who doesn’t — the rational thing to do seems to be to free ride.

Nothing of this precludes Nozick’s “could”, though: it could be that the cheapest form of compensation is to supply protective services and it could be that people won’t free ride, or that only a few will.

§ 71: A “redistributive” minimal state — or how to back into a state against your will

In protecting all, the minimal state is redistributive, then, in that some people — i.e., its clients — pay for services provided to others — i.e., used-to-be independents (who receive tax-funded vouchers with which they can buy protection).5 This is however not redistribution proper in any welfare sense of the.

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5 Therefore Cohen is wrong in claiming that, “citizens in the minimal state, ... are obliged to pay taxes which support that state’s coercive apparatus whether or not they want the protection they get in exchange.”; “Self-Ownership: Assessing the Thesis”, 235. There is no such obligation upon former
The State in Nozick and in Kant

word, since redistribution is here solely a matter of compensating someone for his being disadvantaged by being denied to exercise a natural right of his; namely, the right to enforce his (as well as everyone else’s) rights.

The redistribution element in the minimal state yields the conclusion that there are no independents left as soon as the minimal state is established: those who used to be independents have now become clients against their will — or unwilling clients. (Or willing clients pretending to be unwilling to save on membership fees; cf. “free riders.”) True, they are not like the minimal state’s “full” members; clearly they don’t pay monthly rates for being protected. But just as clearly their position does not match the position they enjoyed in (what must to them now look like) the good old days of the state of nature when there weren’t any minimal state around placing obstacles in their way. (In those days, of course, everyone was an independent.)

When independents are prohibited from enforcing their rights, and even get protected, one cannot claim that the Nozickian minimal state, in contradistinction to “the minimal state ordinarily envisaged by libertarians”, allows “people to choose between a client and independent status ...”6 It does not. Kukathas and Pettit also miss the target in stating that Nozick’s minimal state deserves the tag “the minimal quasi-state” — it is said to be no “minimal state proper” — because, among other things, “it allows independents to enforce their rights against one another.”7 To back their statement they quote Nozick saying that, “The dominant protective agency’s domain does not extend to quarrels of nonclients among themselves.” (109)8 However, this reasoning mistakes the dominant protective association for a minimal state. We have seen that the dominant protective association is not identical with the minimal state. In Nozick’s own words:

A system of private protection, even when one protective agency is dominant in a geographical territory, appears to fall short of a state. It apparently does not provide protection for everyone in its territory, as does a state, and it apparently does not possess

6 Kukathas and Pettit, Rawls, 81.
7 Ibid.
8 Nozick also writes on this topic: “If one independent is about to use his procedure of justice upon another independent, then presumably the protective association would have no right to intervene. It would have the right we all do to intervene to aid an unwilling victim whose rights are threatened. But since it may not intervene on paternalistic grounds, the protective association would have no proper business interfering if both independents were satisfied with their procedure of justice.” (109-110)

The State in Nozick and in Kant

or claim the sort of monopoly over the use of force necessary to a state. In our earlier terminology, it apparently does not constitute a minimal state, and it apparently does not even constitute an ultraminimal state. ... To get to something recognizable as a state we must show (1) how an ultraminimal state arises out of the system of private protective associations; and (2) how the ultraminimal state is transformed into the minimal state, how it gives rise to that “redistribution” for the general provision of protective services that constitutes it as the minimal state. (51-52)

I think what Kukathas and Pettit should have said is that the minimal state allows its citizens — both clients and unwilling clients (who don’t fake it), i.e., former independents — to enforce their rights against one another on a voluntary basis. (There are no independents left who might do so.) Or, to put the same point in a different wording: citizens are allowed to engage in nonstate procedures among themselves provided they voluntarily choose to do so and provided they don’t threaten or violate the rights of other people in applying their procedures — otherwise, their procedures are prohibited. (A [minimal state] prohibition which runs completely parallel to the dominant protective association’s prohibition of independents’ enforcement of their rights against its clients.) I’ll return to the topic of nonstate procedures in § 75.

§ 72: Opting out of the minimal state?

What if an individual finds all of the activities of the minimal state “so repellent that [he] want[s] nothing to do with it” (14) and therefore decides to “contract himself out of it.” (331)? To Nozick’s nonpaternalistic position, a state which forbids people to contract themselves out of it will indeed be a paternalistic state — a regimen paternale, as Kant puts it. Hence a person may back out of the minimal state and establish himself beyond the reach of its apparatus; he may live on his own, or with others, since the minimal state “allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves,...” (334) It therefore looks as if I may live as an independent after all.

But appearances are deceptive here. Consider the following line of argument: If, in backing out, I locate myself in such a way that I inevitably will come to somehow interact with people who haven’t backed out of the minimal state — perhaps I am still a resident on its land (within its borders) — then I cannot “wave goodbye” to the minimal state’s protection, as can be seen in this way:

1. The minimal state will prohibit me (just as the dominant protective association will prohibit independents in the state of nature) from enforcing my (natural) rights
against its remaining clients.
2. Therefore the minimal state must compensate me for being prohibited to do so.
3. This it will do in the form of protection.
4. I therefore get protected whether I like it or not.
5. Hence I will not be able to back out of the minimal state but will remain as an unwilling client; a "no way out" situation.

So if I am determined to retain all my rights, I will receive the minimal state’s protection as long as I find myself within its borders where I might run into conflict with its clients. When I keep those rights, the minimal state will deny me to enforce them myself, and it (morally) cannot but compensate me for that denial — and that it will do by way of protecting me; the minimal state stays “redistributive” as regards protection. And therefore, I have argued, at most one is presented with the “opportunity” of becoming an unwilling client.

Things would be different if the minimal state offered me to lead my life in total isolation from its remaining clients — say, on an island surrounded by floating mines and hungry great white sharks and no helicopters or other air lift capabilities available — because then the issue of compensation would never arise. For while still within its borders — the island is within the geographical area covered by the minimal state — I now cannot ever become a threat to its clients. (To make the example water-tight, we suppose that the islanders are detained in an escape-proof society — Alcatraz like, perhaps.)

Now my argument this far has presupposed that the state we are talking about resembles an actual state in one important respect, namely, that its jurisdiction is complete within a given geographical area (with definite borders). But in a Nozickian world this need hardly be so. Hence things would be very different if the minimal state’s jurisdiction didn’t pervade every piece of land within its area (borders). How could this be? The explanation has to do with Nozick’s view of private property. That is, if you own land you may determine entirely what’s to happen (and not happen) on your land, you may legitimately be a “dictator” because “Any private owner can regulate his premises as he chooses.” (323) Thus there could be a “Swiss Cheese” situation: there could be many “holes” within the borders of a state in which it has no business enforcing its laws or regulations since they are already regulated by their owners. Such an area may also be owned jointly by several people: “The community will be entitled then, as a body, to determine what regulations are to be obeyed on its land; whereas the citizens of a nation do not jointly own its land and so cannot in this way regulate its use.” (322) To get an idea of what things could look like, consider this description:

many particular communities internally may have many restrictions unjustifiable on libertarian grounds: that is, restrictions which libertarians would condemn if they were enforced by a central state apparatus. For example, paternalistic intervention into people’s lives, restrictions on the range of books which may circulate in the community, limitations on the kinds of sexual behavior, and so on. But this is merely another way of pointing out that in a free society people may contract into various restrictions which the government may not legitimately impose upon them. Though the framework [i.e., the minimal state] is libertarian and laissez-faire, individual communities within it need not be, and perhaps no community within it will choose to be so. Thus, the characteristics of the framework need not pervade the individual communities. (320-321)

If there were very many (in this way) closed communities on privately owned land, resulting in few public thoroughfares, there wouldn’t be much cheese left! One could even have a vast plurality of states on each piece of land. Investigating these and other possibilities, as well as interesting questions connected with them — how are borders of a state determined, how may states interact (if at all), when, or whether, a state may intervene in the area of another state, whether a state could be nongeographical and, if so, what it would look like, and so on and so forth — will take us much too far afield, though.

But suppose that although there are many private owners, they have all given the minimal state permission to enforce its laws on their land; suppose, in other words, that we have a realization of a situation sufficiently similar to our condition where states do enforce their laws on private land. (For example, unlike in a Nozickian world, in our world I am not at liberty to catch and eat a nonthreatening person who happens to trespass on my land because my regulations, stated on huge, colourful fluorescent signs, are that “Trespassers will be eaten, dead or alive!”) Hence I have not opted out with my land. Suppose further that I wish to go other places than on my land. Then what? May I back out of the minimal state’s protection program because I, a right-wing antigovernment militia man, want nothing to do with that state? It would seem that the answer is that then the above sequence 1. to 5. will “come back” and so I may not.

Yet there is a “cure” to be found: I may give up the natural right to enforce my rights. Then the minimal state will be set free from the moral requirement to compensate me because now there would be nothing for which compensation needs be paid. In effect, very likely I would be giving up all my rights too since they may no longer be enforced. It would be like saying, “Yes, I am a being with natural rights, but I will not defend myself against, nor exact compensation from,
nor punish, anyone who attempts to violate or who violates those rights." (On the wildly optimistic assumption that no one ever would violate my rights, even when they know perfectly well that they would get away with it, I wouldn't in effect have given up my rights.) The name of the cure thus is "outlawing oneself". To the minimal state, that will be all right; after all, it is no regimen paternale. Presumably few would, out of fear of what could happen to them when left unprotected even by themselves, pick the alternative of renouncing their right to enforce their rights. Likelihoods aside, still principally the nonpaternalistic position entails the standpoint "that someone may choose (or permit another) to do to himself anything" (58) and so I may choose to be a complete outlaw. That is, I permit you and everybody else to do anything to me — which, for example, means that police officers have a standing "hands off!" order not to stop you from killing me just because you don't like the look on my face, say. In fact, since everybody now may do anything to me, any police officer may kill me himself!

§ 73: The post-libertarian critique of the libertarian concept of the state

It is time to take a closer look at the particular functions of the minimal state as nothing has been said on these so far; addressing these functions will provide us with direct access to the nature of the minimal state — to what it actually amounts to. I begin in the "wrong end", starting off with Nozick's rejection of his former libertarianism (cp. my Introduction's § 5).

Apart from rejecting the political philosophy of libertarianism as such, the essay entitled, "The Zigzag of Politics" is also at odds with his specifically libertarian concept of the state. It is therefore well suited for casting a "negative" light on that concept, and so I pick that essay as my point of departure in my assessment of the functions of the libertarian minimal state.

The main theme of the essay may be said to be the symbolic importance of people's joint participation in the political system: "Democratic institutions and the liberties coordinate with them are not simply effective means toward controlling the powers of government ..."; these institutions mean much more to us in that "they themselves express and symbolize, ... our equal human dignity, our autonomy and powers of self-direction." For example, the act of voting in elections is in part an act of symbolically expressing one's autonomy, claims Nozick. For even though I recognize that my actual vote most likely will not help

§ 74: The limited functions of the minimal state and self-imposed paternalism

The libertarian state is compared to the nightwatchman state of classical liberal theory, a state the nature of which is said to be that it is "limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts, and so on, ..." (26) The nightwatchman state, then, would "simply provide a police force, an army, and law courts." — nothing else. Yet Nozick's minimal state is such that you may detach from its legal system: the minimal state allows people to solve conflicts among themselves wholly without its involvement. To a certain degree, this is done today, Nozick observes: "People sometimes now do take their disputes outside of the state's legal system to other judges or courts they have chosen, for example, to religious courts." (14) The principal point is however that people have a right so to act: a "slice" of their right to liberty is their subpoena rights; that is, rights not to take part in the state's legal system (which people may sell so that those who buy them have "the right to force them to participate in the operation of a judicial

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9 Nozick, "The Zigzag of Politics", 286.

10 Ibid., 286-287.

11 Wolff, Robert Nozick, 36.
system; ...” [283]). So, “If all parties to a dispute find some activities of the state or its legal system so repellent that they want nothing to do with it, they might agree to forms of arbitration or judgment outside the apparatus of the state. People tend to forget the possibilities of acting independently of the state.” (14)\textsuperscript{12} Nozick goes on to say (in a parenthesis):

(Similarly, persons who want to be paternalistically regulated forget the possibility of contracting into particular limitations on their own behavior or appointing a given paternalistic supervisory board over themselves. Instead, they swallow the exact pattern of restrictions a legislature happens to pass. Is there really someone who, searching for a group of wise and sensitive persons to regulate him for his own good, would choose that group of people who constitute the membership of both houses of Congress?) (14)

In other words, what he is speaking of here in referring to the possibility of people placing a "paternalistic supervisory board over themselves" is the phenomenon of self-imposed paternalism that I discussed in Ch. III. As we can see, that possibility is opened up for due to the fact that the minimal state’s legitimate domain does not include a monopoly on legal services. Since it doesn’t, it is perfectly consistent with Nozick’s nonpaternalistic position.

§ 75: “Do as you like, but don’t threaten or violate rights”; restrictions on the use of nonstate procedures among individuals

To Nozick, a state which blocked the possibility of acting outside its legal apparatus would also be violating the right anyone has to enter voluntary arrangements of any sort. This is true not only as regards civil law, but as regards criminal law as well. Thus a state that compelled parties A and B to a dispute to submit to its legal system on occasions when they would rather solve their dispute “man to man” by going for some extreme solution — duelng by sunrise, say — would be acting as both A’s and B’s part-owner.

However, the practical accomplishment of nonstate procedures of settling disputes among consenting adults are acceptable only in so far as the outcome of those procedures (due to the particular way, or ways, in which they are accomplished) do not pose a risk to others and do not downright violate the rights of others. If restrictions specifiable in terms of what I would call a “Do as you

\textsuperscript{12} Thomas Fogge informs me that in the last 5-10 years, the use of arbitration has become very common in the U.S. in economic cases, mainly because the courts are too slow and the necessary lawyers too expensive. The bindingness of the arbitration is agreed upon by contract — but, if worse comes to worst, the winning party must still rely on the government for enforcement.

\textsuperscript{13} Perhaps A and B are both thought to be dangerous to other people because they just recently were released from a mental hospital in which they both earned a reputation for not only fighting each other, but also for being very careless as to who else got stabbed during their frequent knife-fighting. (While hospitalized, they obtained knives from outside friends who smuggled them into the hospital, from the canteen’s kitchen, and by turning various suitable items into home-made knives.)
§ 76: Kant on the legitimacy of nonstate procedures among individuals

Interestingly, Kant, too, in his political philosophy, thinks that people may duel without being subject to the laws of the state (which of course do forbid private killings); you may kill another in dueling without thereby being executed yourself afterwards.

Before looking into Kant’s reasons for thinking so, we should keep in mind that Kant insists on capital punishment for murderers: “every murderer — anyone who commits murder, orders it, or is an accomplice in it — must suffer death; this is justice, as the idea of judicial authority, willed in accordance with universal laws that are grounded a priori.” He even ridicules an imagined convict who complains that he, a murderer, shouldn’t receive the death penalty as this would be too hard on him: “one has never heard of anyone who was sentenced to death for murder complaining that he was dealt with too severely and therefore wrongly; everyone would laugh in his face if he said this.”14 Apparently, Kant is not willing to give a murderer the chance to live under any normal circumstances: For example, “the proposal to preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made on him and is lucky enough to survive them” would be rejected “with contempt [mit Verachtung]” by a court, “for justice ceases to be justice if it can be bought for any price whatsoever.”15

And: “Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, ...”16

I say “normal” circumstances, for there may be an exception if “the number of accomplices (correl) to such a deed [i.e., murder] is so great that the state, in order to have no such criminals in it, could soon find itself without subjects; ... (and if it especially does not want to dull [abstumpfen] the people’s feeling by the spectacle of a slaughterhouse), ... in this case of necessity (casus necessitatis)”17

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14 Kant, Rechtslehre, 334/143.
15 Ibid., 332/141.
16 Ibid., 333/142. Does this mean that Kant defends the legitimacy of dissolving a state? May we voluntarily “get back where we started”; namely, to anarchy, this state of nature situation in which, Kant actually claims, “each may impel the other by force [mit Gewalt] to leave this state and enter into a rightful (rechtlech) condition; ...”? Ibid., 312/124. I guess one could resolve what here appears to be a contradiction by putting the following words in the mouth of Kant: “The islanders may dissolve their society, but wherever in the world each decides to live, he must enter into some rightful condition somewhere.”

17 Kant, Rechtslehre, 334/143.
18 Ibid., 336/144–145.
19 Ibid., 336/144; 336–337/145.
20 Kant’s nonrelative (not cultural-relative), principal view, then, seems to be that persons killing others in a duel and unmarried mothers killing their children must die.
§ 77: A “contract” theory without the social contract

The libertarian minimal state, we have seen, is not conceivable as a “product” arising from a deliberate contract among individuals to realize it, but it is an entity which, instead of being set up, unintentionally pops up behind our backs due to the “operations” of the invisible hand. Still, the “engine” powering the invisible hand is the fact that individuals placed in the state of nature create lots of contracts among themselves in order to protect their rights from being violated — the “chain reaction” from the state of nature to the minimal state. Does this mean that Nozick’s is a social contract theory or that it is not?

If one were to hold the theory to be a social contract theory by referring to the contract element at the individual level exclusively, the meaning of the term ‘social contract theory’ would at least be a new one. Charles Taylor describes Nozick’s theory in this way: “We inherit atomism from the seventeenth century. Not that we still espouse social contract theories (although various transposed versions are still popular).”21 In the note accompanying this statement he refers, as examples of what he has in mind when speaking of “transposed versions”, to Nozick’s treatise, beside Rawls’ A Theory of Justice and Bruce Ackerman’s Social Justice in the Liberal State.22 As one will know, Rawls’ theory is a very special version of a “Kantian” abstract social contract theory — unambiguously demonstrated when he emphasizes that we should take care not to think of representatives in the Original Position as anything but “theoretically defined individuals”23, “individuals” in which much of what “make up” a flesh-and-blood human being has being drained away since the theory “generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant.”24 So the tag transposed version appears to be plausible as regards Rawls.

As regards Nozick’s theory, though, Rawls himself argues that it is not a social contract theory at all:

21 Taylor, Sources of the Self, 195. (I explain and explore the term ‘atomism’ in my “Liberahen Charles Taylor som anti-liberal?”)
22 Taylor, Sources of the Self, 546, n16.
23 “I shall mention a few misunderstandings to be avoided. First of all, we must keep in mind that the parties in the original position are theoretically defined individuals.”; Rawls, A Theory of Justice, sect. 25, 147.
24 Ibid., sect. 3, 11. He also says that, “For all its greatness, Hobbes’s Leviathan raises special problems.”; Ibid., fn 4. What these “special problems” are is left unexplained by Rawls.

§ 78: Kant and Nozick on the legitimacy of using force to establish a civil state — and the notion of procedural rights in the latter

While the libertarian view makes important use of the notion of agreement, it is not a social contract theory at all, for a social contract theory envisages the original compact as establishing a system of common public law which defines and regulates political authority and applies to everyone as citizen. Both political authority and citizenship are to be understood through the conception of the social contract itself. By viewing the state as a private association the libertarian doctrine rejects the fundamental ideas of the contract theory, ...25

For these reasons, I guess, Rawls would find the term ‘transposed version’ of a social contract theory a misnomer in the case of Nozick; if a theory is a transposed version of a specific category of theories, at least it must bear some resemblance to that category.

Ackerman, in the work which Taylors calls a transposed version, says of social contract theory: “While “state of nature” and “social contract” are commonly joined in familiar classics, it is not obvious that this is a necessary connection. Thus, Rawls tries to free contract from the fallacies of the state of nature, while Nozick returns the compliment by rescuing the state of nature from contract.”26 But this rescue operation is not a full-scale operation, if I may say so: the social contract is missing, yes, but due to the importance of the notion of contract in the story of the minimal state, one is justified in applying the diagnosis “contract theory without the social contract”. Whichever diagnosis one fancies, though, with regard to the theory’s justification of the state, one thing is for sure: there is nothing like it in the literature.

25 Rawls, Political Liberalism, 265. (In § 88, I will argue that it is correct to think of the minimal state as a private association only.) We should note here that there are different directions in which Nozick is seen as departing from social contract theory: (a) “method” in which social order is brought about — invisible hand vs. contract, (b) kind of social order that is brought about — private association vs. public law.
26 Ackerman, Social Justice in the Liberal State, 6, fn3.
another to enter into a juridical [rechtlichen] state of society." \(^{27}\) Yet, Kant actually grants that were there to be an unanimous consent to remain in a state of nature, "in this state of externally lawless [gesetzerloser] freedom", men will do one another no wrong [unrecht] at all when they feud among themselves; ..."

Nonetheless, such a consent to remain in the state of nature is unacceptable, for "in general they do wrong in the highest degree [im höchsten Grade daran unrecht] by wanting to be and to remain in a condition that is not rightful [rechtlich], that is, in which no one is assured of what is his against violence." \(^{28}\) Later, Kant goes on to say what Nozick quotes him as saying — preceded by the following reflections:

> It is true that the state of nature [natürlicher Zustand] need not, just because it is natural, be a state of injustice [Ungerechtigkeit] (injustus), of dealing with one another only in terms of the degree of force each has [Maße seiner Gewalt]. But it would still be a state devoid of justice [Rechtslosigkeit] (status injustitiva vacans), in which, when rights [das Recht] are in dispute [in controversum], there would be no judge competent to render a verdict having rightful force [rechtskräftig]. Hence each may impel the other by force [mit Gewalt] to leave this state and enter into a rightful [rechtlich] condition; ...\(^{29}\)

One may then conclude that, "Since force is compatible with rights, the force to ensure [a civil condition] is also rightful." \(^{30}\) It should be remembered, though, that Kant thinks that unless a civil condition gets established, sooner or later humans will violate one another's natural rights; they will not be able to live peacefully together in an anarchy. Kant's reasons for thinking so may be found in § 86 below.

We have seen that in Nozick independents are prohibited from enforcing their rights. Do we have a clash of rights here? (Something Nozick would deny was even possible; cp. § 26 above.) How come your right to enforce your rights yourself does not exist in conflict with the dominant protective association's right to prohibit you from doing so? Furthermore, Nozick claims that organizations do not have any special rights not held by individuals — the rights of an organization are merely the sum of its individuals' rights: "no new rights

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\(^{27}\) Kant, Rechtslehre, § 44, 312. Nozick here quotes Ladd's translation (named *The Metaphysical Elements of Justice*). As we shall see in a moment, this translation differs from Gregor's (which is the one used by me).

\(^{28}\) Kant, Rechtslehre, 307-308/122.

\(^{29}\) Ibid., 312/124.

\(^{30}\) Mul holland, *Kant's System of Rights*, 293.

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\(^{32}\) Notice that this juridical state of society will not be one of public law: being a private association the minimal state will in that sense be "lawless", and will instead lay down what better be described as statutory "regulations". Cf. footnote 25 of this chapter and § 88 below.
people have no right to do this. So I reject being prohibited and compensated — on a voluntary basis only will I accept any compensation at all; in the future, perhaps I will offer you not to enforce my rights in return for some compensation. Therefore I am not going to comply.” Needless to say, the moment you slam your door in their face the officers will brake it down, getting at you with batons raised, eventually putting handcuffs on you and bringing you to the station for custody.

If my line of reasoning is sound, one may conclude that Nozick agrees with Kant that force is compatible with rights; he too emerges as a “compatibilist”. Now, one of the “well-known problems” in Kant, observes Patrick Riley, is “whether a citizen may into a political-legal order does not treat them as means to a merely utilitarian end — security”; that is, this question (among other questions listed by Riley) concerns the deeper question of “whether [Kant’s] political and legal ideas are at least congruent with his moral system.”33 In Nozick we could say that the parallel question is this one: Is the prohibition-compensation argument at least congruent with the strong (deontological) Kantian side-constraint interpretation of rights?34

§ 79: Kant’s social contract theory: the state as an “idea of reason”

What Kant says on the legitimacy of using force towards (what in the context of Nozick’s political philosophy we can call) recalcitrant “would-be independents” looks as if it is meant to apply to an actual state of nature situation; if you find yourself in it, then you may … Or, indeed, not only may you use force; you must use force if someone refuses to leave the state of nature, since “in any actual, empirical state of nature Kant thinks our circumstances leave us with no choice other than to enter a civil society.”35 Notice that the must here is a moral: must: if we, morally speaking, have no choice but to enter civil society, then we have, morally speaking, no choice but to use force against the recalcitrant individual either.

Having said that, on the whole, Kant’s theory does not concern itself with the concept of the social contract as an empirical concept. Rather, “When Kant speaks of a contractus originarius, … then this epitaph points out the purely rational status of this concept. ‘Original’ does not mean ‘primordial’. ‘Primordial’ and ‘original’ relate to each other as ‘empirical’ and ‘rational.’”36 Accordingly, the original contract is depicted as an “idea of reason”: “we need by no means assume that this contract … actually exists as a fact, for it cannot possibly be so. … It is … merely an idea of reason [eine bloße Idee der Vernunft], …”37 In a summary, “The contract is not the historical document of the state, but its document of Reason.”, and therefore, “Kant’s political philosophy denatures the contract of modern political theory to a contract which has to be and which everybody is obliged to join … the social contract is … the only way of leaving the lawless, pre-state situation which is in agreement with the juridical principles of pure practical Reason.”38

§ 80: Kant on obedience to the state: the “dogma of absolute sovereignty”

Both Kant and Nozick demand everyone’s obedience to the state, then. But with regard to the issue of obedience, the former goes much farther than the latter. For Kant even has a “dogma of absolute sovereignty” to which Nozick would object strongly since it in effect legitimizes violations of (what I in § 43 identified as) Nozician “core” rights. The dogma is expressed very clearly by Kant in the Rechtslehre:

The reason a people has a duty to put up with even what is held to be an unbearable abuse [Missbrauch] of supreme authority is that its resistance to the highest legislation can never be regarded as other than contrary to law, and indeed as abolishing the entire legal constitution. For a people to be authorized to resist, there would have to be a public law permitting it to resist, that is, the highest legislation would have to contain a provision that it is not the highest and that makes the people, as subject, by one and the same judgment sovereign over him to whom it is subject. This is self-contradictory, and the contradiction is evident as soon as one asks who is to be the judge in this dispute between people and sovereign (…). For it is then apparent that the people wants to be the judge in its own suit.39

We might reconstruct40 Kant’s core idea here like this: If “the highest legislation would have to contain a provision that it is not the highest”, so would the

33 Riley, Will and Political Legitimacy, 134.
34 Cp. my parallel question in § 40 whether not the “violate first, compensate later” position involves taking back the side-constraint view (and so might not be congruent with that view).
35 Williams, Kant’s Political Philosophy, 200.
36 Kersting, “Kant’s Concept of the State”, 148.
37 Kant, Über den Gemeinspruch, 297/79.
38 Kersting, “Kant’s Concept of the State”, 149, 148.
39 Kant, Rechtslehre, 320/131; italics mine.
40 I here follow Cilje, Det naturrettlige kontrakt Paradigmet, 422.
that the people have an absolute duty to heed the authority of the sovereign."  

One then may ask exactly what Kant’s reply to Bouterwek amounts to. As the very critical commentator R. F. Atkinson — who accuses Kant of “moral and political rigourism” — writes, “I wish I could feel confident that I can understand Kant’s reply, ..."  

Anyway, a crucial part of the reply is found in what I shall call the inner-morality constraint located in the parenthesis of AA 371. This is an important parenthesis indeed, and its constraint statement is paralleled by two equally important footnotes in another work: “when men command anything which in itself is evil [an sich böse] (directly opposed to the law of morality [Sittengesetze]) we dare not, and ought not, obey them.”; and, “when statutory commands, regarding which men can be legislators and judges, come into conflict with duties which reason prescribes unconditionally [Pflichten, die die Vernunft unbedingt vorschreibt], ... the former must yield precedence to the latter.”  

There is one crucial passage to be found in a third work too, where it is argued that the people “must not resist/disobey except in those cases that fall outside the civic union, e.g. forced worship, coercion to commit unnatural sins: assassination etc.”  

What to make of this? Is the dogma of absolute sovereignty no dogma at all? Is Kant contradicting himself here — despite his ubiquitous obsession with avoiding contradictions? Or does he commit a category mistake in confusing the otherwise clear-cut distinction between morality and legality: How can a duty of virtue (like the duty not to perform “unnatural sins”) have a “saying” in the realm of duties of justice? Can a duty of virtue trump a duty of justice? “Perhaps Kant thought there to be duties of virtue that can conflict with, and override, even the paramount duty of justice; ...”  

Suspending these questions, a contradiction might look like this:  

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45 Williams, Kant’s Political Philosophy, 202. Notice that there is a distinction between the ruler and the sovereign in Kant: the ruler is the executive power of the state appointed by the sovereign. When Williams speaks of the actions of rulers being arbitrary and unfair, then, these are the “employees” who put into effect the will of their “employer”, the head of state. So, principally, what the ruler does he does on behalf of the sovereign. Complying with what rulers demand therefore means that one heeds the authority of the sovereign. For more on the distinction sovereign/ruler, see § 82 below.  


47 Kant, Die Religion innerhalb der Grenzen der bloßen Vernunft, 138-139, fn90, fn; 231, fn142, fn.  

48 Kant, Reflexionen zur Rechtsphilosophie, 805f.  

49 Pegge, “Kant’s Theory of Justice”, 425, fn49.
I am not saying that there is a contradiction in Kant at this particular point. But it looks like one, and it is not obvious that this is appearance only. Contradiction or not, Pogge argues that, "Kant's acknowledgement of exceptions punctuates his allegiance to the dogma of absolute sovereignty by restoring the potential for conflicting claims about the rightness of external actions. (There is no decision mechanism for mediating a dispute between sovereign and citizen about whether some act would constitute an unnatural sin, or contradict inner morality."

However, Peter Nicholson holds that it is wrong to talk of exceptions in Kant here. In reference to the inner morality-constraint, he writes: "We should not think of Kant as laying down a principle, 'obey the sovereign,' to which he then provides an exception; rather, his fundamental and exceptionless principle is 'obey the moral law,' of which a corollary, also without exceptions, is 'obey the sovereign when his commands do not contradict the moral law'. ... The individual is under an absolute moral duty not to act immorally." Now this talk yields the view that duties of virtue do trump an important duty of justice; namely, that of obedience to the sovereign. But if individuals "ought to refuse to comply with any law or order, obedience to which would involve his acting immorally," Kant's ideas of "unconditional submission" and of a legal duty to put up with "unbearable abuse of supreme authority" seem drained of significance; if individuals may reject out of hand any command they find "immoral", then what is it that Kant means by these ideas? And, one wonders what is left of the sovereignty of a sovereign so constrained; does he even deserve his name? ("You want me for sovereign under that condition? No thanks! Who would call that sovereignty?")

I would like to frame some deliberations and questions for discussion here: Think of "X" in steps 1. through to 5. above as the Nazis' executions of political dissidents in Germany during World War II. (Cf. the true story of the students in the novel "Die weiße Rose"). Then the democratically elected Hitler is Sovereign within a legal structure. If Subject takes the practice of these executions to be an unbearable abuse of supreme authority, must he still put up with it? It seems that he must, for his will faces unconditional submission. Accordingly, he ought also to participate — that is, be active — in the process leading to dissidents' executions if ordered to do so (perhaps by way of gathering information about dissidents that might help in their arrest). Or may he resist the order by, Ghandi like, “not moving an inch” when state officials come to check whether he exercizes good citizenship by following orders — that is, be passive? “Probably Kant thought that only passive resistance could ever be justified, ...” granted that passive resistance can be justified in Kant, Subject may engage in some sort of a “sit down action” of his, but he may not fire at state officials as they approach him. Nor may he resist if they choose to carry him away to be executed because now he has become one of those political dissidents. But then again, if Subject's will really faces unconditional submission to Sovereign's will and Sovereign wills that Subject not be passive, on Kant's own construal, how could Subject possibly resist even passively? A distinction between active and passive resistance which is not explicitly Kant's, we should notice — at this point seems to lose the significance it perhaps never had.

50 Pogge, “Kant’s Theory of Justice”, 425, fn49.
54 One could say that the parenthetical remark concerning the inner-morality constraint implicitly establishes a distinction between active and passive resistance, and that this distinction seems to point towards a conception of civil disobedience. My question, though, is whether there is a role to be played at all for a distinction between active and passive resistance in Kant in view of his talk of "unconditional submission".
55 Mulholand, Kant’s System of Rights, 338.
56 Kant, Rechtslehre, 320/131.
allows this would, in practice, turn out to be unworkable. (A constitution is, after all, a body of fundamental principles according to which a state is governed.) However, remarks Williams, “[Kant] believes this confusion implies that resistance at any time to the authority of the sovereign is unethical. ... But it is difficult to agree that to question and defy certain commands of the sovereign is to question and reject sovereignty altogether.”

But on Nicholson’s and Mulholland’s construal you may defy all those commands which run counter to the Categorical Imperative. Though this will not be a rejection of sovereignty altogether, as I have argued it will drain content from the very idea of sovereignty considerably — as well as make Kant’s idea of unconditional submission look strange.

I shall end the discussion of the present section with a comment by one of the leading Kant interpreters of our time, Henry Allison. In reference to Kant’s view in Die Religion that we ought not to obey “when men command anything which in itself is evil (directly opposed to the law of morality)” (quoted earlier in this section) and to what I have called the inner-morality constraint, he writes that these are “explicit and significant qualifications of the duty to obey.” But, he continues, “Unfortunately, these qualifications of the demand of absolute obedience to the ruling powers remain cryptic remarks, which Kant never integrated into his political theory.”

To so integrate those cryptic remarks (if possible at all) would, to use an expression of Nozick’s concerning another matter, indeed be “a task for another time” — perhaps “a lifetime.” (9) I leave that job to Kant scholars.

§ 81: Kant on revolution: a “completely helpless” political philosophy?

It is however clear that Kant thought that one may not resist unjust rule actively by joining the crowd of “state revolutionaries” (Staatsrevolutionäre) who think they are justified in using force to overthrow political society “when constitutions are bad [verunsichert],” for, “even though [a] constitution may be afflicted with great defects [Mängeln] and gross faults ... it is still absolutely unpermitted and punishable to resist it.”

Zum ewigen Frieden confirms and deepens this view clearly enough:

60 Kant, Zum ewigen Frieden, 382/126.

61 Kant, Über den Gemeinspruch, 301/82.

62 ibid., 299/81; last italics mine. “From the Gemeinspruch-article and onwards”, observes Gilje, “Kant emerges in the public as a definite opponent to the idea of a right to resistance.”; Det naturvetlige kontraktparadigmet, 421.

63 Williams, Kant’s Political Philosophy, 202; 203; italics mine.


65 Kant, Rechtslehre, 353/159; 372/176.
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constitution based on the law of Reason." 63 (I'll get to the question of what this might mean in a moment.) As Kant says himself: "For any legal [rechtliche] constitution, even if it is only in small measure lawful [rechtmäßig], is better than none at all, and the fate of a premature reform would be anarchy." 64 It then appears that if Kant were Subject in the case of monitoring dissidents, his own political philosophy wouldn't be of much help if he wanted to resist Hitler: in World War II Germany, before the Allies' bombings and eventual invasion, the vast majority was guaranteed security and order and non-violence and a certain degree of legal structure was undoubtedly present.

In a situation in which "a certain degree of legal structure" (Kersting) wasn't present, probably Kant would regard the situation as falling short of a juridical state: Suppose our master rules arbitrarily; i.e., there is not even the slightest degree of legal structure. Then one doesn't feel sure that Kant would call an arbitrary (law-less) master a sovereign at all. Rather, it seems we here have a return to a state of nature. The overthrowing of a master in that particular situation wouldn't, on Kant's conception, be a revolution, though, since it wouldn't be a revolt against the head of a state proper; there is no sovereign in the state of nature and thus no sovereign gets removed by force. Williams believes that Kant would say that, "at some point under the rule of Louis XVI, France had descended to such a level of anarchy in social relations that the French people found themselves in a state of nature. ... Under these circumstances the moral and necessary step to take is to seek at all costs to re-establish sovereignty." 65 I suppose "at all costs" here refers to Kant's view that "each may impel the other by force [Gewalt] to leave [the state of nature] and enter into a rightful [rechtlichen] condition; ..." 66

An interesting matter, then, is at what particular point Kant would say that our master may no longer be considered a sovereign: What, exactly, does Kant mean by a constitution which is only in small measure rechtmäßig; how is one to measure this and what might be the baseline here ("how small"); how many and what sort of laws must there be; must the "basic" laws be universal so that no individual or group of individuals are excluded; must at least some laws guarantee at least some rights; or is it "only when law and order breaks down

entirely that the individual has a right to resist" 67

Though it seems hard to tell at what particular point one is justified in saying that the sovereign throws society into a state of nature situation — alternatively: at what particular point his actions become such as to constitute his own abdication — it is clear that Kant thinks that the people will throw society into a state of nature situation if it orchestrates a revolution in seeking its rights: "For such procedures, if made into a maxim, make all lawful [rechtliche] constitutions insecure and produce a state of complete lawlessness [vollen Gesetzeslosigkeit] (status naturalis) where all rights [alles Recht] cease at least to be effectual." 68

In the vein of my own manner of speaking of Kant's political philosophy as being of no help against the rights-violating sovereign, Kersting claims that it is "completely helpless" in this respect — though he also seeks to explain Kant's position by employing some sort of a "principle of charity of interpretation":

In view of the wiliness of state terrorism which our century has produced and never tires of producing, Kant's anti-revolution and anti-resistance argument seems naive and overoptimistic. But we cannot blame Kant for not having anticipated the political pathology of the twentieth century. Within the scope of his rational law conception, legal reformism is a consistent position, the revolution rejecting argument of continuity remains sound, though it must not be concealed that in the case of the autocrat who is reluctant to reform his rule according to the principles of legal reason Kant's political philosophy shows itself to be completely helpless. It is the helplessness of a reformer who is paralysed for fear of revolution ... Kant gives preference to order over justice and preference to the authority of the state over the authority of human and civil rights. 69

If the reluctant autocrat as here described suppresses all public debate, for example, he will act in a self-contradictory way: "To try to deny the citizen [the] freedom [of the pen] ... also means withholding from the sovereign all knowledge of those matters which, if he knew about them, he would himself rectify, ..." 70 Furthermore, a ban on publicity will hinder progress because, "in the event that an entire people cares to bring forward its grievances (gravenien) ... the prohibition of publicity impedes the progress of a people toward improvement, even in that which applies to the least of its claims [Forderung], namely its

63 Kersting, "Kant's Concept of the State", 162; italics mine.
64 Kant, Zum ewigen Frieden, 373, fn/118, fn.
65 Williams, Kant's Political Philosophy, 204.
66 Kant, Rechtslehre, 312/124.
67 Williams, Kant's Political Philosophy, 204-205; italics mine.
68 Kant, Über den Gemeinspruch, 301/82.
69 Kersting, "Kant's Concept of the State", 163.
70 Kant, Über den Gemeinspruch, 304/85. In this quote, "sovereign" is my translation of Kant's obersten Befehlshaber/das Oberhaupt. Nübelt's (from whom the quote is drawn) is "ruler", but this translation is simply wrong; see § 82 below as to why.
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simple, natural right [bloß sein natürliches Recht].” For, “Men will of their own accord gradually work their way out of barbarism [Rohigkeit] so long as artificial measures are not deliberately adopted to keep them in it.”; a state of ought therefore to “allow his subjects to make public use of their own reason ... even if this entails forthright criticism of the current legislation.”

Kant having said all that, still if the sovereign decides to silence all protesters he is in his right, for the “right of remonstrance” is something “which ... the sovereign can also take away” since “the people can never possess a right of coercion [Zwangsrecht] against the head of state [Staatsoberhaupt], or be entitled to oppose him in word or deed.” Which also brings us back to the issue of “the baseline”: at what particular point in a process of taking away — that is, violating — rights is there no longer a sovereign but rather a tyrant, so that resistance not only becomes allowable but a moral duty even to establish a rightful condition? Consider this line of argument: “In principle ... it should be possible to treat [the problem of tyranny] on Kantian premises: If a sovereign systematically violates the subjects’ moral integrity, he must be viewed as a private person armed with the state’s forcible means. In this case there is no essential distinction between a state and a group of organized “bandits”. Accordingly, the situation may be interpreted as a return to the state of nature. Therefore the subjects cannot be said to have a duty of obedience towards a regime of terror.” However, to give content to this intuitively correct argument, the “systematically” must be given some sort of weight. Besides, there will be a question about who’s to interpret the situation as a return to the state of nature; if it is the would-be sovereign (“sovereign”?), his interpretation most certainly will be that we are not in the state of nature; if it is the people, how would they go about to settle for an interpretation — by majority decision?; or may each and everyone have his own, subjective interpretation — and act upon it?; and so on and so forth.

Now consider this description:

Kant’s prohibition of resistance does not imply any duty of obedience to a regime that practices state-terror and murders entire groups of the population. A condition that is dominated by mass murderers does not deserve the title of a condition of right. Unjust laws and a constitution with important rights lacking are one thing; terror, violence, and mass-murder, however, are something else. ... One cannot use [Kant’s prohibition of resistance] to argue for the illegitimacy of resistance against the totalitarian systems of domination of the twentieth century and the mass murder of the Nazis.

Plausible as it sounds, unfortunately Kersting offers no arguments that might have helped to answer what is meant by “important rights” and exactly why, to Kant, “a condition that is dominated by mass murderers does not deserve the title of a condition of right.” Nor is the content of the expression “dominated by” explained to us. Or how many one must murder to qualify for the title “mass murderer”. Obviously, if one kills six million Jews one will pass just any qualification test here, but what if one performs “Die weiße Rose”-killings only; though it would fall short of “mass-murder”, would it amount to “terror” or “violence”?

And so my questions concerning “the baseline” are still unanswered. Perhaps they will stimulate others to help.

§ 82: What’s wrong with Riley’s reading of Kant on revolution

A defence of the coherence of Kant’s moral and political ideas, as well as of the coherence of their interconnection, is found in Patrick Riley. In his book on classical social contract theory the chapter on Kant bears the telling headline, “On Kant as the Most Adequate of the Social Contract Theorists”. Riley thinks that Kant’s “view of revolution, ... while not without its problems, is much more coherent than it is often taken to be, ...” He argues as follows: “even in the Rechtslehre, which treats revolution as destructive of all legality, Kant grants that the sovereign ... can “take his authority from the ruler, depose him, or reform his administration, but cannot punish him.” The removal of a particular ruler would not necessarily constitute an assault on the entire legal order.”

The reference here as regards the quotation from Kant is to the Ladd translation of the Rechtslehre at page 82; the AA page number is 317. Let us quote some more of 317 than does Riley in order to get a more comprehensive picture of things: “a people’s head of state [Beherrschere des Volks] (legislator) cannot also be its ruler [Regent], since the ruler is subject to the law and so is put

71 Kant, Der Streit der Fakultäten, 89/161.
72 Kant, Beantwortung der Frage: Was ist Aufklärung?, 41/59.
73 Kant, Reflexionen zur Rechtphilosophie, 7989.
74 Kant, Über den Gemeinspruch, 302/83; italics mine.
75 Gillje, Det naturrettige kontrakt Paradigm, 429-430.
76 Kersting, “Politics, Freedom, and Order: Kant’s Political Philosophy”, 361.
77 Riley, Will and Political Legitimacy, 161.
78 Ibid., 160.
under obligation through the law by another, namely the sovereign [Souverän]. The sovereign can also take the ruler’s authority [seine Gewalt] away from him, depose him, or reform his administration. But it cannot punish him ...” (128 in Gregor’s translation) What 317 is about, then, is what the sovereign may do towards the executive power — the Agent des Staats or Regierung (government) or Regent whose function is Staatsverwaltung (management of the state). (Kant gives the executive power several names.) This power is appointed by the sovereign; accordingly, the “fate” of the Regent is in the hands of the sovereign — he can depose him but not punish him. The sovereign is thus in place. So far, so good. But then what Kant says here has nothing to do with the subject of revolution: the subject is which processes are legitimate within a state. Riley says, we see, that, “The removal of a particular ruler would not necessarily constitute an assault on the entire legal order.” To be sure, it would not constitute an assault on the legal order at all. The legal order is not of the ruler’s making: the law is created by the sovereign and so the ruler is below it and within it. Bringing down the ruler will then not bring down with it the legal order; what gets removed is the institution which acts on behalf of and within the law given by the sovereign. Nor is it any business of the ruler to participate in the lawmaking. Kant holds: “A government that was also legislative [gesetzgebend] would have to be called ... despotic ...”? So the removal of a particular ruler would, in principle, leave the entire legal order intact.

True, in his later work Kant’s Political Philosophy, Riley tries to modify things in this way: “The removal of some particular ruler — Louis XVI, for example — would not constitute an assault on all legality as such. It would also not be revolution in the most thoroughgoing sense, for the sovereign would remain and would indeed be the agent cutting a defective ruler away from a still living body politic.”80 Here Riley provides a “reply” to a part of my criticism by implicitly criticizing his former work. (There is no explicit reference to it.) But his strange remark about “revolution in the most thoroughgoing sense” only confirms what I have said: Kant’s talk of the removal of a ruler does not concern the subject of revolution in any sense. Furthermore, how can it make sense to say that the sovereign remains after Louis XVI has been removed: who else but Louis XVI — the monarch — were sovereign?

79 Kant, Rechtslehre, 316/128.
80 Riley, Kant’s Political Philosophy, 106. (The title of this work happens to be identical with the title of the work by Howard Williams that I’ve been quoting above.)

Riley says further that,

[because the removal of a particular ruler would not necessarily constitute an assault on the entire legal order], Kant allows that it is conceivable that the dethronement of a ruler may be “effected through a voluntary abdication” and even that the people might have some excuse for forcing this “by appealing to the right of necessity,” provided the ruler is not punished and provided above all that he is not executed. ... If a people simply forces a ruler out of power but lets him live peacefully as a private citizen, Kant is willing to grant that this may be allowable, though he prefers evolution toward republicanism.81

Here the reference to Kant is Ladd, 87-88, fn; corresponding to AA pagination 320-321, fn. Riley here confuses the words “ruler” and “sovereign.” At 320-321, fn Kant is not speaking of the ruler but of “the dethronement of a monarch”. This note is attached to what I called Kant’s infinite-regress argument with regard to sovereignty. Furthermore, in the same note the monarch is described as “the head of state” and “the source of law” — i.e., the sovereign. To put things right, therefore, it is essential that “sovereign” be substituted for “ruler” in Riley here.

But this will not make his argument right, for the following reasons: Ladd’s translation, which Riley quotes, at this particular point (87-88, fn) omits a crucial word from the German original which when inserted topples Riley’s conclusion — even when sovereign is substituted for ruler in the argument. Ladd translates Kant like this: “the people might have at least some excuse for forcibly bringing this [i.e., the dethronement of a monarch] about by appealing to the right of necessity, ...” But the original AA text goes like this: “so hat das Verbrechen des Volks, welches sie erzwang, doch noch wenigstens den Vorwand des Notrechts (casus necessitatis) für sich, ...” The crucial word left out here by Ladd is Vorwand, which means “pretex”, “evasion”. (Gregor employs “pretex”; 131, fn, whereas Nisbet’s translation is “a supposed right of necessity”; 145, fn.) Now, when one reads Ladd one gets the impression that Kant thinks there is a right of necessity — cf. the wording “the” right of necessity. But that is not what Kant says: the people has no such right, but it might be excused for its dethroning of a monarch by reference to a supposed right of necessity. (It is also worth noting that Ladd omits the word Verbrechen, which means “crime”, by not translating it either; this has the effect of making the people’s use of force against the sovereign look less serious than Kant actually takes it to be when he, still at AA 320-321, fn, speaks of “all the atrocities involved in overthrowing a state by

81 Riley, Will and Political Legitimacy, 160.
rebellion, . . .” [131-132, fn in Gregor’s translation]) Hence, Kant is, contrary to what Riley says, not willing to grant that if a people simply forces a sovereign out of power, his dethronement may be allowable; though Kant understands the people’s crime (Verbrechen) he doesn’t think it has a right to commit the crime.

I shall conclude, then, that Riley’s reading of Kant’s view of revolution is flawed in important respects. Therefore the reading cannot serve to make Kant’s view on revolution “much more coherent than it is often taken to be”. Kant might be the most adequate of the social contract theorists, but he is less adequate than Riley thinks that he is.

I shall conclude also that I by no means believe I have somehow “solved” the much disputed issue of revolution in Kant; and perhaps it cannot be solved in any philosophically satisfactory way. But I shall maintain that there is a dogma of absolute sovereignty in Kant — and, in § 84, that there appears to be a version of such a dogma in Nozick.

§ 83: Kant’s ideal “minimal state” and a Nozickian judgement of it: a *regimen paternale*

If one focuses upon what Kersting named “the contractual constitution based on the law of Reason” solely in Kant, the “pressure” from the dogma of absolute sovereignty is lifted. Though Nozick would object to Kant’s *pragmatic—doggmatic* view of the state as unravelled above, he would show a much more sympathetic attitude towards Kant’s concept of the state in the abstract — towards Kant’s ideal state. Having said that, I shall argue that Nozick would reject Kant’s ideal state nonetheless. To arrive at that conclusion, my argument follows this path:

It is crucial to distinguish sharply between the ideal and the actual when speaking of Kant’s concept of the state. Kant gives an answer to the question, “what sort of arrangements should there be ideally?” by employing “thought experiments”: “When Kant asks ‘What could people agree to?’ . . . Kant talks about hypothetical agreements made by hypothetical people. But he does believe these make-believe agreements have moral force for us . . .”, that “we can determine political policies that are logically consistent, prudentially sound and

82 Riley writes “ruler” in this connection (cf. above) and so, as I have pointed to, mistakes the sovereign for a ruler.

83 Riley repeats this point of view in Kant’s *Political Philosophy*, 106-107. He also repeats the mistake with regard to the distinction sovereign/ruler.

properly respectful of each person as an ‘end in himself’.” Now it seems that the application of the dogma of absolute sovereignty should cause no problem were the ideal state to be realized: in obeying the sovereign the people would be obeying itself only — for example, it must submit to policies that protect them as ends in themselves. But Kant is very clear that the dogma applies to already existing states as well: it informs us of the “oughts” of our relation, as subjects, to the state in which we *de facto* live. Thus, “The command [Gebot] ‘Obey the authority that has power [Gewalt] over you’ does not inquire how it came to have this power . . .” (Hence revolution cannot even be justified by reference to a sovereign’s coming to power through the violent usurpation of it.) What is more, it is important that the people not be overly curious about the origin of the authority; since the people is “already subject to civil law” such curiosity is not only “altogether pointless [ganz zweckleere]” but will also “threaten a state with danger.” (It is worth noticing that these words appear very shortly before the statement of the “dogma of absolute sovereignty” at AA 320.)

In obeying the authority of the ideal state, however, one obeys an authority which happens to be The Great Protector of Rights because it is derivable from pure practical reason in an *a priori* fashion:

The civil state, regarded purely as a lawful state [*bloß als rechtlicher Zustand*], is based on the following *a priori* principles:

1. The freedom of every member of society as a human being [*als Menschen*].
2. The equality of each with all the others as a subject.
3. The independence of each member of a commonwealth as a citizen.87

A law given in accordance with these principles should, in order to secure the sort of just situation that the principles demand for, not be “such that a whole people could not possibly agree to it (for example, if it states that a certain class of subjects must be privileged as a hereditary ruling class) . . .”88 Kant’s own

84 Hampton, “Contract and Consent”, 386; italics mine.
85 Kant, *Rechtstheorie*, 372/177.
86 ibid., 318/130.
87 Kant, *Über den Gemeinschaupfeif*, 290/74.
88 ibid., 297/79. "The norm of the contract is obviously the counterpart to the categorical imperative in political ethics, as it were the categorical imperative of political action. Just as the categorical imperative as a moral principle allows for the evaluation of the lawfulness of maxims, so does the original contract as the principle of public justice serve to measure the justice of positive laws. The application of the norm of a contract requires nothing more than a thought-experiment that is a variant of the test of universalizability that is familiar in moral philosophy.

Kersting. "Politics, Freedom, and Order: Kant's
example here elucidates what I mean by giving laws in accordance with the three a priori principles: a law which grants such a privilege will run afool of principle 2. because it follows from 2., says Kant, that a subject’s “fellow-subjects may not stand in his way by hereditary prerogatives or privileges of rank and thereby hold him and his descendants back indefinitely.”\footnote{Political Philosophy”, 355.} What 2. demands, then, is that there be equality before the law. As examples of laws incompatible with 1., we can think of paternalistic laws which see to it that a subject does what a subject’s got to do for him to be happy the way he, “upon the judgement [Urteile] of the head of state ... ought to be happy”.\footnote{Ibid., 291/74.} One is justified in saying, then, that “Kant raises with this economically interpreted independence a contingent fact into the ranks of an a priori founding principle ...”\footnote{Ibid., 295/78. I have altered Nisbet’s translation here to make it more in keeping with the original. Nisbet’s goes like this: “The only qualification required by a citizen (apart, of course, from being an adult male) is that he must be his own master (sui iuris), and must have some property ... to support himself.” Kant writes: “Die dazu erforderliche Qualitiit ist, außer der natürlichen (daß es kein Kind, kein Weib sei) die einzige: daß er sein eigener Herr (sui iuris) sei, mithin irgendein Eigentum habe ... welches ihm erlaubt; ...”} — with the amusing consequence that the wigmaker is an independent person whereas the hairdresser is not.

Now, at face value it doesn’t seem hard to imagine that a whole people — hairdressers included — “could not possibly agree” that some of its members should be denied citizenship. But Kant emphasizes that the could-not-possibly-agree constraint has to do with a person only “in so far as he can claim citizenship”:\footnote{\textit{Kant, Über den Gemeinspruch}, 297/79.} and as long as the criteria of citizenship are set the way they are set, neither hairdressers nor women can claim citizenship. I think we should reject Kant’s position here because of the fact that he moves in a question-begging circle: he has himself blocked all other ways of understanding citizenship but his own way and so the expression “a whole people” cannot but exclude women, for instance.

That a law be viewed as unjust if a whole people could not possibly agree to it we might call the “negative formulation” in this context. The “positive formulation”, on the other hand, requires that “if it is at least possible [nur möglich] that a people could agree to it, it is our duty to consider the law as just [gerecht], ...”\footnote{Ibid.} Thus Kant offers a two-sided touchstone (\textit{Probierstein}) with which the legislator can “test” the laws he is about to frame — the negative test and the positive test. Being true to a distinction between the ideal and the actual, however, Kant is quick to point out that the people “can do nothing but obey [gehören]” if “some existing legislation” on its judgement “in all probability would prejudice its happiness” and the existing legislator decides to uphold that existing legislation. For the restriction (\textit{Einschränkung}) on the framing of laws — the \textit{Probierstein} — “obviously applies only to the judgement [Urteil] of the legislator, not to that of the subject.” And the people should never forget that “the power of the state [which put[s] the law into effect \textit{die Macht im Staat, die dem Gesetz Effekt gibt}] is ... irresistible [unwiderstehlich]” and will “suppress all internal resistance [\textit{allen inneren Widerstand niederschlägt}].”\footnote{Ibid., 298/80; 297/79; 299/81.}

Bracketing off Kant’s unfortunate mixture of empirical and a priori considerations with regard to principle 3. above, the Kantian ideal state surely must satisfy the rights theorist Nozick, one is inclined to think, not least since Kant, in being “true to the liberal tradition ... regarded the fundamental task of government as negative, as imposing those constraints that are necessary to protect and promote each person’s freedom.”\footnote{What is more, as we saw in § 15, this government is consistent with a \textit{laissez-faire} model of economic life due to Kant’s stark rejection of economic egalitarianism — as opposed to his endorsement of political egalitarianism, displayed in principles 1. to 3. The promotion of economic egalitarianism may not only be said to be “unworkable,}
because everyone has different and conflicting interests and aims; more important, the efforts to achieve economic equality would also require continual violations of justice and civil liberty.”

How very reminiscent this is of the Nozickian complaint that all patterned and end-state theories imply violations of liberty — i.e., freedom of transfer. (The point is also put the other way round: “How liberty upsets patterns” [cf. 160-164].) As Nozick sees it, “no end-state principle or distributional patterned principle of justice can be continuously realized without continuous interference with people’s lives.” (163)

Though Nozick would welcome a state which protects and promotes each person’s freedom, he would reject it if it also denied him to renounce his right to freedom. A collision between Kant’s concept of the state and Nozick’s concept of the state with regard to rights takes place in Kant’s arguments against a supposed right to renounce rights: our detailed account in § 69 showed that Kant clearly defends an “inalienability thesis” as far as the right to freedom is concerned — a right which he claims is the only original (ursprüngliche) right. This thesis of Kant’s, we said in that section, contradicts both Nozick’s conception of rights and his nonpaternalistic position (the countours of which match fully) — and so Nozick would call Kant’s position paternalistic. His comment on Kant’s ideal state might then be imagined to be something like this: “At first sight, it looks very nice. But in viewing freedom as inalienable it’s paternalistic nonetheless. Unfortunately, therefore, it violates people’s self-ownership; it acts as people’s part-owners. The paradox is that it is exactly because it is founded upon freedom that this state becomes paternalistic. To avoid that unwelcome consequence, Kant should have founded it upon self-ownership instead. For when a person owns himself (fully), he owns his rights and may do whatever he fancies with them. When he may do this, he is treated as a separate person.”

While it is not unreasonable to say that Kant is “a representative of the “nightwatchman-state” of classical liberalism.” to Nozick Kant’s version of the ideal minimal state is unreasonable. Hence, presumably Nozick would agree with A. John Simmons that, “the doctrine of inalienable rights fits uncomfortably into a consent theory, for it smacks of a paternalism that consent theorists, above all others, have opposed.” He goes on to say that, “I know of no good arguments, within the consent tradition or without, for the existence of inalienable rights.

97 Ibid., 16.
98 Gilje, Det naturrettelige kontraktparadigmet, 306.

...“99 Accordingly, the way he sees it, nor Kant has any good arguments for the existence of inalienable rights. However, in reference to Kant’s Über den Gemeinspruch he acknowledges that the issue is complex. Kant’s position notwithstanding, Simmons leaves the issue by stating that “this is not the place to argue that there are no [good] arguments [for the existence of inalienable rights].”

If myself do think that there are such arguments — and that Kant has them. I therefore think that Simmons is wrong, and that Nozick’s position on the issue should be rejected. To argue the case would, among other things, however require the reconstruction of portions of Kant’s political philosophy. (The arguments I have in mind are not stated explicitly by Kant himself.) But this is not the place to attempt that — it deserves a work of its own. A hint to what it is I am speaking about here is the following. The fact that selling oneself into slavery, say, would be a violation of a duty of virtue is, I think, a fact which can get Kant nowhere if conceived of as an argument for his prohibition on such selling (contracts); in view of the sharp dividing line between morality and legality in Kant (cf. §§ 12 and 14 above), purely moral arguments directed against the performance of act X through which an individual inflicts upon himself consequences Y aren’t really available to him. (It won’t do to say, in reference to perfect duties to oneself, that X implies “disposing of oneself as a mere means [höfes Mittel]” and thus amounts to “debas[ing] humanity in one’s person [die Menschheit in seiner Person abwürdigen] ...”101) Kant has cut himself off from that possibility — and needs to, too, in order to be able to end up with (what he indeed ends up with, namely) a model of a liberal state not marked by the espousing of “despoti” paternalism. What must be shown is how rights-renouncing contracts violate duties of justice (if they do); that they will threaten, or undermine, the juridical state as such and thus conflict with the universal principle of Right (Allgemeines Prinzip des Rechts). That is, we could be on our way towards one of the things Kant feared most: a state of nature devoid of justice. (Cp. § 86 below.)

99 Simmons, Moral Principles and Political Obligations, 68.
100 Ibid.
101 Kant, Tugendlehre, 423/219.
§ 84: Does Nozick have a dogma of absolute sovereignty and an anti-revolution argument?

Suppose that within the libertarian vision, “almost everyone wished to live in a communist community, so that there weren’t any viable noncommunist communities”. (322) Even if that were the case, Nozick claims, “no particular community need also (though it is to be hoped that one would) allow a resident individual to opt out of their sharing arrangements. The recalcitrant individual has no alternative but to conform. Still, the others do not force him to conform, and his rights are not violated. He has no right that the others cooperate in making his nonconformity feasible.” (322; italics mine) This individual obviously doesn’t consent (explicitly) to living according to the community’s regulations, and obviously he cannot leave — he is, so to speak, surrounded by legitimate “Berlin Walls”. Contrary to this particular situation with only one viable community, there were other viable communities and the communist community deliberately erected that kind of escape-proof structures to keep him back, they would be acting illegitimately; then the minimal state would take action, “enforcing an individual’s right to leave a community.” (330)

Do we here have a case of a Nozickian “dogma of absolute sovereignty”? I ask this question against this background: If the communist community’s regulations are such that the recalcitrant individual must pay taxes, say, the individual “has no alternative but to conform.” (332) Or, in the words of Kant, he “has a duty to put up with even what is held to be an unbearable abuse [Mißbrauch] of supreme authority” — if he is of a libertarian conviction, this is no doubt how he will view things — since his will faces “unconditional submission [unbedingte Unterwerfung]”.102 Here: to the communist community’s supreme authority. Worse still, the community might disrespect all his LHP-rights of self-ownership. But even if they do, they don’t use force to make him conform and hence “his rights are not violated.” (322) And so the individual must display complete obedience to the arrangements of the community in which he is stuck.

At the same time, the position expounded here seems to yield an anti-revolution argument also: the individual may not rebel against the community’s system of laws (arrangements), even should they command acts which, the way he sees it, “conflict with inner morality”.103 (Tax laws may well conflict with a whole-hearted libertarian’s inner morality.) Or, indeed, not even if the community were “governed” by some totalitarian guru the community had put in charge, and who made arbitrary decisions. (Not based upon law at all.)

The more or less tentative conclusions drawn by me in the present section also hark back to the Nozickian view that rights cannot conflict that I discussed in § 26. I noted there that others exercising their rights — that is, acting within their rights — can indeed limit a person’s rights, but not (thereby) violate his rights. Here, though, the limitation may legitimately be total. However, that causes one to wonder whether not the situation with the one community will trigger off the Lockeian proviso.

§ 85: Do we need a state at all? A Nozickian reply

“If the state did not exist would it be necessary to invent it? Would one be needed, and would it have to be invented?” (3) “The fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all.” (4)

We have seen (in § 70) the invisible-hand explanation of the emergence of the state in Nozick. Yet, all that explanation says is that a state will grow out of a Lockean state of nature provided most people act in certain ways in which they (empirically) could have acted — basically, by respecting the law of nature and by pursuing goals “deducible” form rational self-interest. This, clearly, is not to say that a state is needed; it is merely to say that we’ll get it anyhow (whether we like it or not). But suppose the assumption about the invisible hand is mistaken, or “the hand” produces an outcome (perhaps very) different from the minimal state. Would we then need it? Put otherwise: on the Nozickian conception of humans, are they such that a state is needed to constrain them so that they won’t violate one another’s rights in the same degree as they would without the presence of that constraining institution? To make some progress towards an answer to that question we must first “go back” to Nozick’s description of how humans will act in the state of nature.

While encircling the major characteristics of the state of nature situation Nozick depicts this situation as, “a nonstate situation in which people generally satisfy moral constraints and generally act as they ought. Such an assumption is not wildly optimistic; it does not assume that all people act exactly as they should. Yet this state-of-nature situation is the best anarchic situation one reasonably could hope for.” (5; italics mine) Thereby, Nozick avoids the sort of

102 Kant, Reckeslehre, 320/131; 372/177.
103 Ibid., 371/176.
oppose institutional schemes involving governmental authorities and coercion... this is not opposition to institutions as such. In fact, anarchist theorists typically make detailed proposals of practices, procedures, rules, and norms that are to regulate and pervade the entire social system.\footnote{\textit{Pogge, Realizing Rawls}, 24, fn19.}

One important point in our above summary (in § 70) of the (empirically) could-happen story of the minimal state is that those operating an ultraminimal state are morally required to transform it into a minimal state. But, adds Nozick, "they might choose not to do so." (119) Therefore "one would feel more confidence if an explanation of how a state would arise from a state of nature also specified reasons why an ultraminimal state would be transformed into a minimal one, in addition to moral reasons, ..." In any case, "the explanation [of how a state could arise] continues to lean heavily upon people's moral motivations, ..." (119) What we have, then, is a story that lays great emphasis upon morality's motivational force. What we don't have in Nozick, I shall conclude, is a clear answer to but one of his own questions at pages 3 and 4; namely, to the one about our having to \textit{invent} a state if it did not exist. Presuming there is such a thing as an invisible hand "operating" behind our backs in the Lockeian state of nature, the answer is that engaging in such inventing would really be a waste of time and energy: as long as most of us generally act as we should, simultaneously pursuing our rational self-interest, we'll get the minimal state "effortlessly".

\section*{§ 86: Do we need a state at all? A Kantian reply}

How would Kant respond to "The fundamental question of political philosophy", namely, "whether there should be any state at all." (4), and what might be said to be the relation between Kant's (reconstructed) answer here and his conception of humans?

I'll start my outline of a Kantian response by noticing (what will soon be documented, namely) that Kant places considerable weight upon the dark sides in man and how these sides tend to motivate human action. Having said that, perhaps no philosopher is as concerned as is he with our capacity for acting on principle, i.e., the principles of pure practical reason, also. We might say that this capacity is, in effect, what enables man "to bind inclination", to use an expression of Nozick's:

Kant wanted duty to be based upon something other than a good inclination, in order to

\textsuperscript{104} In whom the state of nature is (famously depicted as) a very dangerous situation in which "the life of man [is] solitary, poore, nasty, brutish, and short." Hobbes, \textit{Leviathan}, ch. XIII, 186. There is however some controversy over how exactly to understand Hobbes' use of the state of nature device. Tom Sorell provides some views here in relation to Nozick: "According to chapter 1 of Anarchy, State, and Utopia, the idea of a state of nature is particularly well suited to 'explanatory political theory', the sort of theory that specifies in non-political terms how 'the political realm' could have been generated, though it was not generated that way. ... Hobbes's use of the state of nature is best understood, I think, as contributing to a venture in rhetoric, broadly conceived. He wants to persuade people that remaining obedient to a \textit{de facto} protective power is for the best. ... Hobbes tries to conjure up in his readers a vivid conception of anomaly or stakelessness, a conception calculated to bring into operation passions favorable to obedience, namely fear of death and hope of enjoying a moderately-scaled good life." Hobbes, 146-147, n3.
bind inclination. He wanted a more secure basis for morality — for what if the good inclination were absent or not strong enough? Many constructions of theoretical ethics are based upon a fear or distrust of our own inclinations and are meant to bind them. A basis is sought for the good, a factual existence to undergird it, because the allure of goodness is presumed not to be strong enough without some additional authority. Similarly, those who try to root goodness in rationality presume that rationality is the more secure of the two.\footnote{Nozick, “Darkness and Light,” 216.}

In fact, Kant is quite pessimistic with regard to empirical, human nature — the locus of our inclinations — and sometimes sounds almost like a Hobbes. For example, he insists upon “a radical innate evil in human nature [eine radikale, angeborene (...) Böse in der menschlichen Natur]”.\footnote{Kant, Die Religion innerhalb der Grenzen der bloßen Vernunft, 27/28.} And summarizing some of the horrible things humans do to one another, he speaks of “the scenes of unprovoked cruelty in the murder-dramas enacted in Tofoa, New Zealand”; “vices of barbary [Laster der Rohigkeit]; man’s ‘propensity to hate’; and of ‘victors [who] boast [of] their mighty deeds (massacres, butchery without quarter, and the like)’.\footnote{Ibid., 28/28; 28/28; 29/28; 28, fnz28, fn.} Elsewhere, there are remarks about men’s “self-seekings inclinations [selbstwürdige Neigungen]” and “evil attitudes [bösen Gesinnungen]” — and there is the famous observation that, “As hard as it may sound, the problem of setting up a state [Staatserrichtung] can be solved even by a nation of devils (so long as they possess understanding [Verstand haben])”.\footnote{Kant, Zum ewigen Frieden, 366/112; 366/113; 366/112.}

Comments Otfried Höffe: “Where they hope for mutual advantage, devils will cooperate with each other; in all other instances they will be unscrupulous in ignoring other people’s interests, unhesitatingly tending towards dishonesty and deception. What are meant by ‘rational devils,’ then, are single-minded or radical egoists.”\footnote{Höffe, “Even a Nation of Devils Needs the State: the Dilemma of Natural Justice”, 125.}

But making the above remarks by Kant the focal point will cause us to lose sight of the fact that he is no Hobbesian as far as the conception of humans is concerned. A paradigmatic example showing that he is not is found in Kant’s description of the state of nature as not necessarily an antiscial condition; “For a state of nature [Naturzustände] is not opposed to a social but to a civil condition, since there can certainly be society [Gesellschaft] in a state of nature, but not civil society [öffentliche Gesellschaft] (which secures what is mine or yours by public laws [öffentlicher Gesetzen]).”\footnote{Kant, Rechtslehre, 242/67. He adds that, “This is why Right [Recht] in a state of nature is called private Right [Privatrecht].”; ibid.} Hence, it “is true that the state of nature [natürlicher Zustand] need not, just because it is natural, be a state of injustice [Ungerechtigkeit] (inusitus), or dealing with one another only in terms of the degree of force [Gewalt] each has.” Nonetheless, “it would still be a state devoid of justice [Rechtslosigkeit] (status iustitias vacua), in which, when rights [das Recht] are in dispute (us controversum), there would be no judge competent to render a verdict having rightful force [rechtsskräftig]. Hence each may impel the other by force [Gewalt] to leave this state and enter into a rightful [rechliche] condition; ...”\footnote{Ibid., 312/124.} (Cp. § 78 above.) One might say that Kant views this status iustitias vacua as potentially so dangerous to man as an end in himself that he goes as far as recommending the use of force to leave it behind. What he seems to be saying, then, is that unless a civil condition gets established, sooner or later humans will violate one another’s rights. For they cannot avoid coming into conflict with one another as long as “the spherical surface of the earth unites all the places on its surface” — conversely, “if its surface were an unbounded plane, men could be so dispersed on it that they would not come into any community [Gemeinschaft] with one another, ...”\footnote{Ibid., 262/83-84.} In other words, men will not be able to live peacefully together in anarchy.

Georg Geismann claims that they wouldn’t be able to avoid conflicts “even if one conceives mankind within a “kingdom of ends’”, for “the problem of Right would still need to be solved.” This is not so because of “the fact that human actions are determined by inclinations rather than by reason and its laws”, but because of “the fact that the spheres of action between two or more persons are not in a pre-established law-governed harmony.” Accordingly, “That’s why Kant’s (and already Hobbes’s) crucial point is totally missed if one says (as do e.g. Höffe, Williams, Wood in the tradition of Augustine as well as of Fichte) that no State would be necessary if all people would act according to the moral law. It is the lawlessness not of the individual wills, but of the “natural condition of mankind” which causes the problem. Therefore public Right and thus also public legislation and public judges would still be needed. Only the enforcing
The State in Nozick and in Kant

Kant’s answer to the fundamental question of political philosophy (Nozick) is, then, that there should indeed be a state; it should replace the all too dangerous state of nature which, while not necessarily unjust, is still a situation devoid of justice. And if Geismann is correct, it wouldn’t help much were humans in the state of nature always to let the moral law be “in command”: a state would still be necessary. As far as Kant’s conception of not-quite-ideal humans — that is, us — is concerned, it is probably best expressed in his picture of man’s dual nature, a view comprehended in the successful idea of man’s “unsociable sociability” (angesellige Gesellschaft). This idea points to an inner tension in man; he is drawn in two opposite directions — towards being antisocial and towards being social. This tension is apparent in Kant’s definition of ‘evil’ too: “the proposition, Man is evil [böse], can mean only, He is conscious of the moral law [des moralischen Gesetzes bewußt] but has nevertheless adopted into his maxim the (occasional) deviation therefrom.” Because of man’s “transcendental” freedom he can listen to the moral law and act upon it, or he can turn his back on it.

§ 87: The withering away of politics in the libertarian state

Nozick declares that his model of the ideal society is utopian: “Utopia will consist of utopias ... Utopia is a framework for utopias ... The utopian society is the society of utopianism. ... utopia is meta-utopia: ...” (312) Now, “One persistent strand in utopian thinking ... is the feeling that there is some set of principles obvious enough to be accepted by all men of good will, precise enough to give unambiguous guidance in particular situations, clear enough so that all will realize its dictates, and complete enough to cover all problems which actually will arise. Since I do not assume that there are such principles, I do not assume that the political realm will wither away.” (330; italics mine) But what of the realm of politics made up by a political system — be it parliamentary, checks and balances, nondemocratic (but still rights-respecting), or whatever system consistent with our rights — alongside the institutions of the minimal state itself? Will it wither away? It is perhaps not so much a question of it withering away as a question of it ever seeing the light of day. I find it difficult to imagine a space

for politics in the libertarian minimal state. The argument is as follows.

Part III is (corresponding to the three elements in the work’s title) called “Utopia”, and this part is covered by chapter 10, entitled “A Framework for Utopia”. Now, “The framework for utopia ... is equivalent to the minimal state.” (333) Nozick asks: “won’t there be some rigid limits about it, some things inalterably fixed?” — and answers: “So long as it is realized at what a general level the rigidity lies, and what diversity of particular lives and communities it allows, the answer is, “Yes, the framework should be fixed as voluntary.”” (331) That it be voluntary implies that anyone “may use the voluntary framework to contract himself out of it.” (331) The (fixed) minimal state is there for the protection and enforcement of my rights; indeed, that is all it is there for — a view confirmed in Philosophical Explanations: “Political philosophy, as I see it, is mainly the theory of what behavior legitimately may be enforced, and of the nature of the institutional structure that stays within and supports these enforceable rights.”

When the minimal state is fixed as voluntary, accordingly the legitimate tasks to be carried out by it will be permanently fixed tasks too: the state will continue to perform its (limited) functions that are consistent with my rights. Unless I choose to not let it do so on my behalf, for example, if I choose to outlaw myself (cf. the argument of § 72 above) — “some things individuals may choose for themselves, no one may choose for another.” (331). We now can see why Nozick says the minimal state should be fixed as voluntary: it will then be possible for me to exercise my rights of self-ownership; then I can, because those rights are “all mine” (my possession only), do to myself anything — i.e., retain or let go of my rights, either partially or totally. Or, to put things upside-down in this connection: “a nonvoluntary framework [would permit] the forced exclusion of various styles of life.” (331) In other words: it would violate my rights of self-ownership. It is irrelevant which styles of life are excluded in practice; that some are is sufficient for the violation of persons’ rights of self-ownership to take place since then they may not do to themselves just anything. (They might do a lot to themselves, but not X; which may stand for one particular act only — selling oneself into slavery, say — or a series of specified acts.)

As long as the minimal state’s legitimate tasks (functions) are fixed there is no legitimate way to change or re-define its tasks through political action. Now why, exactly, is that so? The answer has to do with what the minimal state


115 Kant, Die Religion innerhalb der Grenzen der bloßen Vernunft, 26/27.

116 Nozick, Philosophical Explanations, 503.
represents. It represents our fundamental, inviolable rights — nothing more, nothing less; “How dare any state ... do more. Or less.” (334) Any attempt to expand, or diminish, the range of that state’s operations accordingly will be illegitimate action. To illustrate: A more-than-minimal state like a tax-based welfare state would violate people’s self-ownership through the violation of their thing-ownership since “taxation is theft” of their legitimate holdings. (Look up § 34 above.) A move in the opposite direction, for example reducing the state into an ultraminimal one, would mean that nonclients/independents were prohibited from enforcing their rights themselves without compensation for this prohibition being paid — which of course would run afoul of the principle of compensation. “It would be morally impermissible for persons to maintain the monopoly in the ultraminimal state without providing protective services for all, even if this requires specific “redistribution.”” (52) An entity not “catching all” with regard to protection, then, is an illegitimate entity.

From these reflections there emerges (at least) one important point to be made: Since political action (whatever it may consist in) cannot legitimately help to re-define the functions of the minimal state (“No expanding, no diminishing.”), there is no need for a political system in order to change its nature. All we need is the political apparatus of the state; namely, the police apparatus, the military apparatus, and the juridical apparatus including a legislative. Hence the withering away of politics.

§ 88: The autonomous position of the minimal state and individual rights

When (or if) there is a political apparatus only, the minimal state emerges as an autonomous entity. Since no institutionalized political structure exists that may challenge and counterbalance its power, the state enjoys a very powerful position vis-à-vis its citizens. Thereby one faces this question: how to control and limit the political apparatus? “The messiness of the details of a political apparatus and the details of how it is to be controlled and limited do not fit easily into one’s hopes for a sleek, simple utopian scheme.” (330) In other words, a delicate version of the classical problem of “how to guard the guardians”: “There will be problems about the role, if any, to be played by some central authority (or protective association); how will this authority be selected, and how will it be

117 Contemporary states are, due to the on-going lawmaking processes within different political systems, subject to constant changes in what roles they perform, depending on the actual balance of power in national assemblies, the state’s functions are sometimes enlarged, sometimes cut down.

118 For some remarks on the selection issue, see the next section (§ 89).
119 Barry, On Classical Liberalism and Libertarianism, 143.
120 Rawls, Political Liberalism, 264. For an explanation of the “just like any other” claim, see ibid., 264-265.
appropriate functions, because I have nothing special to add to the standard
literature on federations, confederations, decentralization of power, checks and
balances, and so on.” (330)

This concession is however insufficient if taken as an excuse for not dealing
more thoroughly with these “difficult and important problems”. For even if
Nozick had had something “special to add”, such adding wouldn’t have touched
the heart of the matter. Why not? Because no amount of literature on what
Nozick here ignores could solve the main problem identified above: his concept
of the state does not seem to allow for political control at all; accordingly, there
is neither room for federations, nor confederations, nor decentralization of power,
nor checks and balances, nor any other form of political control. So we do not
need any more literature on political control as regards Nozick’s minimal state —
as a matter of fact, we do not even need “the standard literature”; it is of no help
to know the full range of forms of political control when there isn’t any room for
political control. When the autonomous position of the minimal state implies a
centralization of power — when this centralization happens to be a distinctive
feature of the very nature of that state — we wouldn’t be interested in hearing of
how one may decentralize its power since that can’t be done anyway. By way of
a parallel, a person permanently in a wheelchair might be interested in acquiring
knowledge of height jumping, i.e., this knowledge might have intrinsic value to
him, but he doesn’t need that knowledge in order to jump himself; since he is
unable to jump, he will not be interested in it as some kind of tool.
Correspondingly, even though there appears to be no way to control the minimal
state politically, we might be interested in learning about forms of political
control of a state, perhaps because we find this information interesting in its own
right, but we will not be interested in such learning in order to control the
minimal state.

§ 89: Securing individual rights in the minimal state: shareholders’ control?

“Indeed, it is sometimes noted that, as it stands, Nozick’s political philosophy
seems to leave no place for politics, for there are apparently no political
procedures at all within the minimal state.”121 Wolff’s analysis is different from
my own on this issue, but he makes an interesting suggestion as regards control
of the dominant protective association that fills in a blank spot in my analysis
thus far:

we can...think of individuals as members, rather like shareholders, in the organization. If
so, they can bring the organization to account for its activities, force it to change its
pricing policy, or vote new ‘directors’ on to the board. This way members can exert
rigorous control over the agency in a way in which the market is unable to do, and so, in
principle, they may remove any undesirable feature the agency may develop. ... [This
suggestion] goes some way to make good [the] omission [of political procedures within
the minimal state]. Electing officers at the Annual General Meeting is a good
representation of a Parliamentary Election.122

What Wolff is implying, I take it, is that this model of shareholders’ control of
the dominant protective association might be a model for how to control the
minimal state too. If so, one problem one will face — a problem which will then
be “transferred” to the minimal state level — is the following:

Since the protective association is, we may suppose, a mutual benefit insurance company,
I receive in the mail each year a notice of the annual shareholders’ meeting, together with
a request from the management for my proxy. I have roughly the same sort of control
over the actions taken by the protective association in my name as I do now over the
actions of the telephone company — with one exception: Now, if I get mad enough at
the telephone company, I can write to my Congressman and ask that the government
pass a law regulating the telephone company. In Nozick’s model, however, the dominant
protective association is the government123

This we may call “the problem of monopoly” as regards state power in Nozick.
Perhaps there could be shareholders’ control of state action as indicated, or in
some other, similar way. The question remains, though, whether such control
would be sufficiently rigorous and far-reaching as compared with the control
exercuted by some sort of political system to counterweigh state power. Here, of
course, we cannot but speculate since the world hasn’t even seen anything
resembling a Nozickian minimal state. Besides, one must say something about
what sort of political system one will pick for comparison and how that particular
sort of system is expected to counterbalance the state.

§ 90: On the desire for economic benefits and for political power

The centralization of power in the minimal state is, theoretically at least, a
problem as far as the protection of rights is concerned, I have noted. Yet Nozick

121 Wolff, Robert Nozick, 58.
122 Ibid. We may notice that Nozick discusses the topic of shareholders’ control over actions in relation
argues that the nature of a minimal state is such that it doesn’t lend itself so easily to be misused neither by economically well-off persons nor by persons who “thirst for political power” (272) as does a nonminimal state: “The minimal state best reduces the chances of ... takeover or manipulation of the state by persons desiring power or economic benefits, especially if combined with a reasonably alert citizenry, since it is the minimally desirable target for such takeover or manipulation. Nothing much is to be gained by doing so; and the cost to the citizens if it occurs is minimized.” (272) Why is that? Because no one may use the minimal state for other tasks than its very limited functions “tells” it to perform, they can’t legitimately use it to make themselves wealthier through taxes in their own favour, say; taxing people for any other purpose than the covering of protection services is out of the question (cf. 26-27 and my §§ 70 and 71 above). Those desiring political power will be equally constrained by the limited functions possible for a minimal state to carry out; for example, “paternalistic intervention into people’s lives, ... limitations on the kinds of sexual behavior, and so on.” (320), usually made possible through legislation, is a road blocked by people’s rights of self-ownership. And so there is nothing much to be gained by your takeover as long as you respect rights.

But if my argument above is mainly correct, those who thirst for political power will in fact stay thirsty since there will be nowhere to go for a drink; political power is to be found nowhere. “Where a locus of such power exists, it is not surprising that people attempt to use it for their own ends.” (272) No, it is not, but where there is no such place people will look for other means to further their ends. In Nozick those will be the means of institutional power found in the apparatuses of the police, law courts, and military. Hence people will seize upon any chance to get offices within these apparatuses.

§ 91: How to establish a political system

Within the minimal state (the framework for utopia) there may co-exist an extreme variety of different communities:

Visionaries and crackpots, manics and saints, monks and libertines, capitalists and communists and participatory democrats, proponents of phalanxes (Fourier), palaces of labor (Flora Tristan), villages of unity and cooperation (Owen), mutualist communities (Proudhon), time stores (Josiah Warren), Bruderhof, kibbutzim, kundalini yoga ashrams, and so forth, may all have their try at building their vision and setting an alluring example. (316) ... there will not be one kind of community existing and one kind of life led in utopia. Utopia will consist of utopias. ... Utopia is a framework for utopias. ... The utopian society is the society of utopianism. ... utopia is a meta-utopia: ... the environment which must, to a great extent, be realized first if more particular utopian visions are to be realized stably. (311-312)\textsuperscript{124}

However, there needn’t exist any pluralism at all — the pluralistic model doesn’t require that there be pluralism: “Each community must win and hold the voluntary adherence of its members. No pattern is imposed on everyone, and the result will be one pattern if and only if everyone voluntarily chooses to live in accordance with that pattern of community.” (316) This position, I shall claim, opens up to us the opportunity of establishing a government in the following way: If all contemporary generations in all (contemporary) communities jointly chose to have and establish a common government — regardless of which legitimate procedure(s) for choosing a policy there happened to exist within each community and which made the choice possible — and agreed to empower it to rule throughout the entire range of communities, then it would, given favourable empirical conditions, see the light of day. A further step would be needed to reach the permanent fixing of a government (remember that the framework, or minimal state, within which these steps may be performed is permanently fixed at the outset): all future generations in all future communities must repeat the coordinated choice in order that there be a permanently fixed government. In the first step (concerning present generations) one may establish a particular, contemporary government (composed of particular people). In the second step (concerning all future generations), one would witness a kind of creato continua of the institution of government; though governments (people) come and go as time goes by, the institution of government will not as its realization is repeated over and over again. The point generalizes: if one by these steps may establish a government, one may also establish a whole political system — the institution of government included — in the very same way (a parliamentary system, say).

\textsuperscript{124} in arguing against those who believe in the possibility of constructing one society suitable for the vast variety of tastes and persons, Nozick makes the following rhetorical remarks: "Wittgenstein, Elizabeth Taylor, Bertrand Russell, Thomas Merton, Yogi Berra, Allen Ginsburg, Harry Woloson, Thoreau, Casey Stengel, The Maharishi Robbe, Picasso, Moses, Einstein, Hugh Heffner, Socrates, Henry Ford, Lenny Bruce, Baba Ram Dass, Gandhi, Sir Edmund Hillary, Raymond Lubiz, Buddha, Frank Sinatra, Columbus, Freud, Norman Mailer, Ayn Rand, Baron Rothschild, Ted Williams, Thomas Edison, H. L. Mencken, Thomas Jefferson, Ralph Ellison, Bobby Fischer, Emma Goldman, Peter Kropotkin, you, and your parents. Is there really one kind of life which is best for each of these people? ... Try to describe the society which would be best for all of these persons to live in. ... The idea that there is ... one best society for everyone to live in, seems to me to be an incredible one." (310-311) And: "Sitting down at this late stage in history to dream up a description of the perfect society is not of course the same as starting from scratch. ... [Noneetheless] It is helpful to imagine cavemen sitting together to think up what, for all time, will be the best possible society and then setting out to institute it. Do none of the reasons that make you smile at this apply to us?" (313-314)
Then there would be political control and constraints on the minimal state.

§ 92: “What exactly will it all turn out to be like?”

But how realistic is it to expect that this could actually take place? (Theoretically there is of course no question about its “taking place”.) Who knows. We should observe, though, that Nozick’s talk of “one pattern of community” (at 316) — the partial realization of which we would have in my thought-experiment — is all a matter of what one may legitimately go for, not of what is likely or unlikely to happen. Indeed, it is not clear at all what Nozick thinks will happen within the framework:

“Well, what exactly will it all turn out to be like? In what direction will people flower? How large will the communities be? ... Will all of the communities be geographical, ... Will most communities follow particular (though diverse) utopian visions, or will many communities themselves be open, animated by no such particular vision?” I do not know, and you should not be interested in my guesses about what would occur under the framework in the near future. As for the long run, I would not attempt to guess. ... Only a fool, or a prophet, would try to prophesy the range and limits and characters of the communities after, for example, 150 years of the operation of this framework. (331-332)

In Ch. III’s footnote 45, I said that this rhetoric could be viewed as a “cover up” of Nozick’s general unwillingness to discuss what empirical consequences might follow were his “inspiring vision” (333) to be realized.123 But that need not bother us right now. What we should reflect upon, though, is the following: If one picks up some of Nozick’s other rhetoric (extracted from 310) and recasts it (considerably), a question might go like this: “Try to describe the empirical conditions under which it is realistic to expect all present and all future communities to unanimously approve of the permanent fixing of a political system (the institution of government included) alongside the minimal state.” I myself am unable to think up a plausible description here — let alone a description at all! — and so I assume, in accordance with my previous argument,

123 Cp. also with these claims: “Nozick’s libertarian scheme imposes servitude upon slaves and excludes persons from things, such as land, held by nonconsenting owners. Under it the freedom of large segments of the population is likely to be very severely restricted. But Nozick shows no interest in an empirical examination of this issue.”; and, “Nozick’s disregard for engendered phenomena leads him to ignore the empirical question of whether his libertarian ground rules would work as intended or could even sustain themselves. They might tend to engender a good deal of noncompliance, as compared to many differently organized social systems — rampant corruption among minimal-government officials, frequent private feuds and civil wars, and a high crime rate (borne, perhaps, of the desperation of large numbers of people). It is possible that the institutions of the minimal state constitute only a minimal improvement over the Lockean state of nature.”; Pogge, Realizing Rawls, 45, 54-55; all italics mine.

that the realm of politics (as distinct from the political realm) will wither away in Nozick.

Now I could be wrong here since my argument presupposes that there will be a very wide range of (very) different communities. Perhaps developments within utopia cause there to be not many but only a few communities not that different from one another. (A development Nozick allows for in speaking of the possibility of one pattern: cf. 316.) Perhaps these communities turn out to resemble, roughly, Scandinavian social-democracies in the following way: After living for some time within the libertarian minimal state (framework) and witnessing (what they take to be) the very ugly sides of unrestricted laissez-faire capitalism, people decide that they want nothing more of libertarianism. (I.e., they didn’t find the “inspiring vision” [333] inspiring at all.) They organize in a few communities and look to Scandinavia and opt for “the Scandinavian way”; that is, that model gets implemented in the few communities that remain. If so, it is not totally unrealistic to expect the two-step process concerning generations I described in § 91 to take place: that similar societies founded upon a similar ideological basis should be able to reach an agreement about having a common government. (After reading Rawls, they might even choose to institutionalize a political system more or less in tune with the main ideas of A Theory of Justice and of Political Liberalism.) But then this line of reasoning about possible developments has a quite strong presupposition built into it; namely, that all future generations within these communities will in fact repeat the first choice.

As for the topic of possible developments, Pogge believes that, “In short, the available evidence from history and social theory may suggest that Nozick’s scheme would have feudalistic features ...”— and adds that, “If his ground rules did really tend to engender a degenerate form of feudalism, Nozick might well regret it. But he would not reconsider his commitment to libertarian ground rules.”126 In “The Ideal and the Actual”, Nozick writes that, “Often an actual situation is described as a corruption of the ideal it purports to follow, and different people have said of communism, capitalism, and Christianity each that “it is a good idea that never has been tried.””. But, he asks, “Couldn’t one say, instead, “It’s a good idea; too bad it’s been tried”?”127 Now if things really turned out the way Pogge believes they would in Nozick, that is exactly what one

124 Ibid., 33, 36. I have left out the reasons Pogge presents to underpin the last sentence here; see the further argument in ibid., 36.

125 Nozick, “The Ideal and the Actual”, 279.
would say of his framework for utopia. I even think Nozick himself would say so; but by the logic of his own argument he couldn’t call it an illegitimate development.

We have seen that, as it stands, Nozick’s libertarian political philosophy lets the minimal state enjoy an autonomous position and so, I have argued, that state lends itself more easily to be (mis)used as an instrument of rights violations than do “traditional” minimal states. Let me note in closing this topic that seen from the standpoint of the post-libertarian position, the presence of democratic politics is an important element in a liberal society: “given a choice between permanently institutionalizing the particular content of any group of political principles thus far articulated — I mean the types of principles meant to specify what goals should be pursued within a democracy, not the ones that underlie a democracy itself by providing its rationale and justification — and the zigzag process of democratic politics, one where the electorate can have been presented with those same principles too among others, I’ll vote for the zigzag every time.” Also, “The libertarian view looked solely at the purpose of government, not at its meaning; hence, it took an unduly narrow view of purpose, too.” 128 Now there may be slippage in the word “government” here, for there apparently is no government to have a purpose in Anarchy, State, and Utopia. (There apparently is no room for a government, I have pointed out.) It seems, then, that Nozick should have said that the libertarian view looked solely at the purpose of the state.

§ 93: “His is the only life he has”: a concluding remark on the Nozickian conception of rights and concept of the state

One of the crucial purposes of the libertarian state is the enforcement of contracts. Throughout I have emphasized the legitimacy of all kinds of voluntary contracts in Nozick and how that view, in various ways, connects with the thesis of self-ownership and the non paternalistic position. We may say that a state which refuses to enforce or which prohibits certain voluntary contracts — because it considers them morally wrong (on some understanding of “morally”), stupid, horrible, or what you will — on the Nozickian conception of rights conjoined with the Nozickian concept of the state would fail to treat the parties to these contracts “as persons having individual rights with the dignity this constitutes.” (334) In thus going against a person’s freely (noncoercively) chosen way of life a state “does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.” (33) But now consider this sentence: “his is the only life he has.” The added emphasis here, I think, makes things look quite different than they look from the Nozickian point of view. For the more we focus upon the “only”, the more plausible the thought that we here have a reason for not enforcing or allowing certain contracts after all; i.e., those which, in various ways, involve the destruction of a person’s only life — be it immediate or “slow” destruction, conceived either physically or psychologically, or both, or the sort of destruction of a person’s life which takes places when others (legitimately) gain complete, or near complete, control over his only life. Of course, to Nozick we would then be paternalists, or, more to the point, proponents of “paternalistic aggression”. (34) Some will however think that the real contribution of Nozick’s libertarian position lies in the fact that it provides us with some of the best reasons ever for being such proponents — occasionally.

129 I say “or” because a state which refuses to enforce contract C need not also prohibit the making of C, which it will then be up to a voluntarily instituted third party to enforce. Normally, though, I conjecture that states will both refuse to enforce and prohibit. For example, members of rival gangs might agree, even by contract, that a member of the one gang who is caught within the area controlled by the other rightfully deserves to have his right arm broken and sent away. (Gangs operating in big cities tend to have the weirdest of — mostly unwritten — rules upon which they act.) No state will enforce such contracts; nor will any state think it all right that others do so in its place, and hence prohibit them.
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