

Non-consequentialism and Political Philosophy*

Philip Pettit

Resumen

Robert Nozick mostró cómo la teoría del derecho natural, por ejemplo la de John Locke, puede invocarse en defensa de una teoría libertaria del Estado. Aquí se sostiene que Nozick no demuestra que el hecho de invocar los derechos naturales sea una prueba contra el desafío consecuencialista. Se presenta un panorama sobre el no-consecuencialismo en teoría política, mostrando por qué la concepción adoptada por Nozick, basada en los derechos, es básicamente no-consecuencialista. Como teoría moral, el no-consecuencialismo existe en diversas maneras, tanto bajo la forma deontologista, como kantiana, contractualista, de las virtudes, de los teóricos del derecho y del egoísmo. Todas las variantes no-consecuencialistas establecen qué deben ser o hacer los agentes morales. En este sentido todas son universalistas. La diferencia fundamental entre los consecuencialistas y sus opositores es que en tanto cada parte privilegia determinados principios generales, difieren en cuanto a lo que tales principios implican.

Palabras clave: consecuencialismo – no-consecuencialismo – Nozick – derecho natural

Summary

Robert Nozick has shown in which ways the theory of natural law (in John Locke, for instance) can be invoked to defend a libertarian theory of State. This paper suggests that Nozick does not prove that invoking natural rights may be a proof against the consequentialist challenge. An overview of non-consequentialism in political theory is then presented, showing what Nozick's conception, based in rights, is basically non-consequentialist. As moral theory, non-consequentialism exists in various ways, be it deontologist, Kantian, contractualist, of virtues, of the theorists of law and of selfishness. All of these non-consequentialist variants express what moral agents have to be or do. In this sense, all of them are universalist. The fundamental difference between consequentialists and their opponents is that even though each of them gives priority to specific general principles, they differ as regards what is implied by such principles.

Key words: consequentialism – non-consequentialism – Nozick – natural law

Robert Nozick¹ did political theory a great service when he showed how a theory of natural rights, such as John Locke² endorsed, could be invoked in

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¹ Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

² John Locke, *Two Treatises of Government*, ed. P. Laslett (New York: Mentor, 1965).

defence of a libertarian theory of the state; in particular, could be invoked in defence of such a theory without defeating itself in the exercise by giving even greater support to anarchism. The result is that his book now stands unchallenged as the most coherent statement available of the case for a rights-based defence of the minimal, libertarian state.³

But there are two challenges that the invocation of natural rights in defence of the state must face, not just one. Those who invoke natural rights certainly have to show that their approach does not slide into a rights-based defense of a sort of anarchy, and I am happy to concede that Nozick establishes something close to this result. But they also have to show that the approach does not slide into a defence of the state that is ultimately based, not on a non-consequentialist theory of rights –and not, more generally, on a non-consequentialist theory of any kind– but rather on a consequentialist theory of goals that the state ought to try to promote.

My contention in this paper is that Nozick does not establish that his invocation of natural rights is proof against this consequentialist challenge and, more generally, that it is difficult to see how any non-consequentialist political philosophy could be proof against it. Political philosophy is that branch of ethics or moral philosophy that tells us what the state should be and should do, assuming that the state is to be given a legitimate monopoly of force in a society.⁴ The problem of developing a non-consequentialist political philosophy that does not ultimately devolve into a consequentialist theory is analogous to a problem that arises in ethics more generally but the political problem, as we shall see, is a particularly pressing one. The fact that it does not figure much in the debates between consequentialists and their opponents is a suprising lacuna in the literature.

The paper is in three sections. In the first, I offer an account of non-consequentialism in political theory, showing why the rights-based approach adopted by Nozick is non-consequentialist in character. And then in the following two sections I look respectively at two variants on the consequentialist challenge. The first is the familiar question as to why the state should have to treat certain principles as constraints, not as goals. I call this the treatment problem, since it asks why the state should treat principles in a certain way: viz., as constraints rather than as goals. The second is the less frequently posed question as to why the state should have to treat these

³ For his own later criticisms, see Robert Nozick, *The Examined Life* (New York: Simon and Schuster, 1989), 286-292.

⁴ Robert Nozick, *Philosophical Explanations* (Oxford: Oxford University Press, 1981), 503.

principles in particular, and not some other set, as constraints. I call this the selection problem, since it focusses on why we should select one set of principles rather than any other as the principles that ought to constrain the state.

1. PRINCIPLES, CONSTRAINTS AND RIGHTS

Non-consequentialism and consequentialism

As a theory of personal morality, non-consequentialism comes in many forms. Deontologists hold that agents ought to discharge certain duties: they ought to tell the truth, keep their promises, be non-violent, and so on. Kantians say that agents ought to act on the categorical imperative –act only on a maxim that they could accept as a general law of behaviour– or ought to treat other people always as ends, never merely as means. Virtue ethicists say that they ought to manifest certain virtues in their behaviour. Contractualists assert that they ought to conform to principles that no one could reasonably object to as the bases of social life. Theorists of special obligation say that they ought to deal in a certain way with those who are bound to them, such as their children, spouses, and friends. Rights theorists maintain that they ought to respect certain rights that others have against them. Egoists say that they ought to try and advance their own welfare. And so on.

What is the common thread in these positions? All non-consequentialists speak, at whatever level of abstraction, about what any or every agent ought to do or be; in that sense they are universalists. All non-consequentialists prescribe neutral principles of behaviour or psychology or relationships for such agents: that they act on the categorical imperative, manifest certain virtues, nurture their friendships, respect the rights of those they deal with, advance their egoistic ends, and so on; the principles are neutral in the sense that they can be understood in the same way by everyone. And all non-consequentialists say that the right thing for an agent to do is to instantiate the prescribed principles –so far as they are co-instantiable– in their own behaviour or relationships or psychology. In particular, they say that that is the thing to do even if instantiating a principle in their own life means, because of the perversity of the agent’s circumstances, that the principle will be less fully realised than otherwise in the world as a whole.

Non-consequentialism extends naturally from personal to political morality: from the theory of what private agents –personal or associational– ought to do and be to the theory of what the state ought to do and be. It holds, in every form, that there are universal principles that any state ought to

instantiate in its own behaviour or relationships or, if this is thought relevant, psychology. And it insists that the state ought to instantiate such a principle even if doing so means, because of the perversity of circumstances, that the principle will be less satisfied in the world as a whole: say, less satisfied among its own citizens.

Consequentialism takes two steps away from this position in ethics and politics.⁵ The first step is to assert that there are certain potentially shared values by means of which possible states of affairs can be ranked, though perhaps not completely. These may be the neutral principles in behaviour or relationships or psychology that the non-consequentialist favours; states of affairs may be ranked as valuable, in other words, so far as they involve everyone's acting on the categorical imperative, everyone's manifesting certain virtues, everyone's nurturing his or her friendships, and so on. Or the values for ranking states of affairs may be neutral outcome-principles that are more detached from how people behave: principles to the effect that happiness should be maximised, for example, or uninhabited wilderness preserved.

The second consequentialist step is to say that the right choice for an agent to take in any decision is one of those choices, assuming there is at least one –assuming incomplete ranking is not a problem– that promote the overall realisation of such values or principles. Promoting overall realisation may mean acting in a way that actually leads to the highest level of realisation or acting in a way that maximises the expected level of realisation; I sidestep this source of ambiguity here. I also abstract from the question of whether consequentialism should be extended beyond the realm of action and choice to the domains of motives, rules, decision-procedures and so on.⁶

The basic difference between consequentialists and their opponents, under this account, is that while each side privileges certain general principles –treats them as values, as it is natural to say– they differ on what this privileging involves. The consequentialist side says that the important thing for any agent –for people or associations or states– is to promote the realisation of those principles in the world at large, while the opposing side says that the important thing is rather for those agents to instantiate the relevant principles

⁵ Philip Pettit, "A Consequentialist Perspective on Ethics", in M. Baron, M. Slote, y P. Pettit, eds., *Three Methods of Ethics: A Debate* (Oxford: Blackwell, 1997). Pettit, "Non-consequentialism and Universalisability", *Philosophical Quarterly* 50 (2000): 175-90.

⁶ P. Pettit and M. Smith, "Global Consequentialism", in *Morality, Rules and Consequences: A Critical Reader*, Brad Hooker, E. Mason, and D. E. Miller, eds., forthcoming (Edinburgh: Edinburgh University Press), 121-133.

in their behaviour or relationships or psychology. Consequentialists say that privileged principles should be treated as consequences or goals to be promoted, non-consequentialists that they should be treated as constraints to be instantiated or respected.

Nozick's application of the distinction to rights theory

This account of the divide between consequentialism and non-consequentialism derives, in its essentials, from points made by Robert Nozick in Chapter 3 of *Anarchy, State and Utopia*. The core idea appears in his contrast between goal-centred and constraint-centred theories. The goal-centred or consequentialist theory holds up various patterns that ought to be advanced by agents. The constraint-centred view holds up various principles that ought to be respected by them, even if respecting the principles means that they are less well respected overall.

In his book Nozick puts the account to use in describing what is involved in believing, as a non-consequentialist, that the state is bound by certain rights, and in defending that belief. The rights by which he thinks that the state is bound are the rights associated with Locke's state of nature; in their core, rights not to suffer harm to one's life, health, liberty, or possessions.⁷ He argues that to be a rights theorist in the Lockean tradition is to hold that the principles associated with respecting relevant rights are constraints on the state. They are principles such that the state ought to instantiate them in its behaviour towards other agents, in particular towards its own members. And they are principles such that the state cannot justifiably fail to instantiate a given principle simply because an opportunistic breach promises to promote the overall realisation of that principle better than conformity would do. 'The side-constraint view forbids you to violate these moral constraints', he says; and it forbids this, even if a violation would 'lessen their total violation in the society'.⁸

This account makes two features of rights more perspicuous than they were before the appearance of Nozick's book. First the insistence that rights are constraints, not goals, explains the sense in which a right counts as a trump, in Ronald Dworkin's phrase.⁹ A right may not be a trump in the extreme sense that nothing ever justifies a breach of the right; few rights will have the infinite weight required for being a trump in that sense. But every

⁷ Nozick, *Anarchy, State and Utopia*, 10.

⁸ *Ibid.*, 29.

⁹ Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978).

right, by the suggested account, will be a trump in at least this sense: that the overall promotion of respect for the right will never justify a breach of the right. Every right will be an asset held by people such that they can invoke it to protect themselves against those who would trample on them in the name of maximising the very principle associated with respecting the right. Consider the right to freedom of speech, for example. This right, qua right, can be invoked against a state that would silence a fascist group, even when the group, if allowed freedom of speech, is likely to stir up populist passions and drastically reduce freedom of speech among minorities.

The other feature of rights that becomes particularly clear, under this account, is that endorsing a theory of rights in the proper, traditional sense is to be distinguished from being a consequentialist about rights. One would be a consequentialist about certain rights if one thought that the state –or any other agent– should promote the principles associated with respecting those rights, even if that meant that it does not instantiate respect for the rights in its own behaviour or relationships or psychology. This is ‘something like a utilitarianism about rights’, Nozick¹⁰ argues; ‘violations of rights (to be minimized) would replace the total happiness as the relevant end state in the utilitarian structure’. Thus a state that is prepared to silence a political group in order to promote freedom of speech –say, in order to stop the group popularising racist attitudes– does not endorse the right of freedom of speech as a constraint on its own activity; it merely treats such freedom –the enjoyment of the right– as a goal that should be promoted.

Not only does Nozick give a perspicuous characterisation of non-consequentialism and use this to make clear what is involved in holding the state to Lockean rights. He also raises in the sharpest possible way the problem that any such rights theory must face: that of showing that whereas Lockean rights argue for the minimal as against the non-minimal state, they do not argue for anarchy as against a state of any kind. ‘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’¹¹ (ASU, 4). His deservedly celebrated answer to that question is that if we imagine a Lockean state of nature in which people respect one another’s rights and suppose that those people are rational, then we will be able to see that without ever having to breach such rights those people would be rationally led to

¹⁰ Nozick, *Anarchy, State, and Utopia*, 28.

¹¹ *Ibid.*, 4.

establish something close to the minimal state. I have discussed this argument elsewhere and won't address it further here.¹²

2. THE TREATMENT QUESTION: WHY TREAT THESE PRINCIPLES AS CONSTRAINTS?

The issue

How will consequentialists react to non-consequentialism in political theory? Specifically, how will they react to the claim that certain principles –say, the principles associated with respecting Lockean rights– have to be instantiated, at whatever promotional cost, by the state? They will inevitably ask: ‘Why treat these principles as constraints?’. That question, as we shall see, has two readings, each associated with a distinct challenge. In this section we take it as a question as to why non-consequentialists should think that the principles they privilege should be treated as constraints to be instantiated rather than as goals to be promoted. Hence the underlining in the title question.

The question for Nozick, then, is why the Lockean rights that he prizes should be taken as pointers to principles that the state should instantiate, rather than as pointers to principles that the state should do its very best to promote. This question is more telling in political theory than in ethics generally, as the state may often be in a position where, in principle, it can best promote the enjoyment of Lockean rights –or any principles that are plausibly hailed as constraints– by itself offending against some of those rights. It may be objected that the state cannot ever be safely entrusted with such a promotional task but I put aside that objection for the moment.

We naturally describe situations where an individual can best promote a certain principle by breaching it in his or her own behaviour or relationships or psychology as perverse. The situations that come to mind are those where an individual can scandalise others by breaching the principle and can thereby induce them not to follow suit; and those where, for equally unlikely reasons, the individual can reduce the opportunity for others to follow suit by breaching the principle in his or her own case. But situations where the state can best promote a principle, in particular a principle of the sort associated with Lockean rights, by itself breaching the principle are much easier to imagine.

¹² Pettit, *Judging Justice* (London: Routledge, 1980).

Consider the principle associated with freedom of speech or freedom of association or anything of the kind. Or consider the principles linked with other broadly Lockean rights such as the right not to be arbitrarily harmed or deprived of one's possessions or held in detention. We already saw that the state may be in a position where, faced with an increasingly influential fascist group, it is clear that freedom of speech will be better served overall in the society if it now deprives this group of freedom of speech. And a similar point will hold in regard to the other rights. There are many possible cases where a preemptive, rights-breaching strike by the state –be this an exercise of violence or coercion or intimidation or incarceration– will promise to reduce the incidence of such breaches generally. If the state punctiliously instantiates the relevant principle in its own behaviour –respects the right– it will often have to face the prospect of seeing that right much more grievously breached on the part of others than it would be if it itself were less punctilious. Montesquieu surely had this sort of situation in mind when he wrote: 'the usage of the freest peoples that ever lived on earth makes me believe that there are cases where a veil has to be drawn, for a moment, over liberty, as one hides the statues of gods'.¹³

In response to this possibility, then, consequentialists will insist on the question of why, to take Nozick's own view, the state should have to treat Lockean rights as constraints rather than as goals. Non-consequentialists may avoid having to make a response by arguing that they are only interested in ideal theory: that is, in the theory of how the state should be and behave, assuming that those who live under it will fully comply with its laws; assuming, in particular, that the state will not have to consider breaching the privileged principles in order to mitigate the effect of breaches by others.¹⁴ But while it may be perfectly proper for non-consequentialist theorists to restrict their attention for certain purposes to ideal theory, they cannot postpone for ever the issue that we have raised. So how then are they likely to respond?

Two responses that collapse into consequentialism

There are three responses I can envisage non-consequentialists making. One will be to object that the state cannot be entrusted with promotional tasks of the kind in view here; this is the objection that I put aside above. The idea is that the power which state officials would be given by entrusting them

¹³ Montesquieu, C.d.S., *The Spirit of the Laws*, ed. a.t.A.M. Cohler, B.C. Miller, and H.S. Stone (Cambridge: Cambridge University Press, 1989), 204.

¹⁴ John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971).

with the preemptive, opportunistic discretion envisaged would be so great as to corrupt the most virtuous individuals and that it would lead overall to a worse result than that associated with a severely constrained state. It would lead in the end to more violation of the rights in question, not less.

The second response that non-consequentialists may make is closely related to this first line and may be considered in tandem with it. The response I have in mind says that if the state instantiates rights-related principles, even at a promotional cost to the overall satisfaction of those principles, it will thereby promote a further more important goal better than it would have done by being given a power of breaching the principles opportunistically. Non-consequentialists might argue, for example, that by being punctilious in its treatment even of the fascist group we imagined, the state can thereby induce a confidence among its citizenry that they do not live at the mercy of the state they have created: that it is not a Leviathan in their midst but an inherently respectful and constrained agency.

The problem with both of these responses is that they play into the hands of non-consequentialists. They each argue that the reason it is good that the state should be bound to instantiating or respecting certain rights-related principles is, in the end, a consequentialist consideration. The consideration in the first case is that binding the state to suitable rights-related principle will actually reduce the overall level of rights-violation, since an unbound state is likely to run amok. And the consideration in the second is that binding the state to such rights-related principles is required for the cause, not of reducing overall rights-violation, but of promoting some further more important goal.

Under either response to the challenge raised, non-consequentialists represent the constraints to which they would bind the state as conditional constraints of a kind that consequentialists will be happy to acknowledge. They are constraints that the state must honor so far and only so far as that is taken to be the best way of advancing the ultimate goal by which things are assessed, whether that goal be the non-violation of the rights in question or the promotion of some further good. The constraints no longer represent the categorical imperatives imagined by non-consequentialists but get turned into hypothetical imperatives of the kind that consequentialists or teleologists routinely support. Nozick is prepared to tolerate a certain conditionality in Lockean constraints, suggesting that 'they may be violated in order to avoid catastrophic moral horror'.¹⁵ But –defensibly or not– he thinks that such

¹⁵ Nozick, *Anarchy, State and Utopia*, 30.

suspendability under catastrophe is to be distinguished from the smooth dependence that would come with a consequentialist perspective.¹⁶

As a consequentialist, I have no difficulty in thinking that it may be best, from the point of view of the overall good by which the performance of a state is to be judged, to bind the officials of the state to certain constraints. I have argued elsewhere that the goal of promoting freedom as non-domination –freedom in the sense in which it requires not being under the power of another, even the power of a benign other– requires that officials of the state be constrained in such a manner.¹⁷ It requires that officials not be allowed, on the basis of their own calculations as to what will best promote freedom as non-domination, to breach the constraints that are laid on their behaviour in the name of precisely that goal. If non-consequentialists take any such line then they give up on their distinctive commitment. They require officials of the state to be bound by certain constraints but only on the understanding that imposing this requirement best serves their ultimate, consequentialist goal.

So much for the first two responses that I said non-consequentialists may make to the challenge raised in this section. Before turning to consideration of the third, I should add that just as they cannot invoke any other goal or telos in support of the constraints they would impose on the state, so non-consequentialists cannot invoke Robert Nozick's own notion of symbolic utility or value as something by reference to which they might hope to justify imposing constraints.¹⁸ We can imagine someone's arguing that by recognising Lockean rights as constraints on its behaviour, the state can symbolise the importance of people's enjoying a certain immunity in relation to the state. Maybe so. But those who use this argument remain steadfastly within a consequentialist frame of thinking. There may be actuarial difficulties about how consequentialists are to count symbolic consequences in their calculations, because these consequences are sensitive to the very reasons for which actions are taken.¹⁹ But the argument that the state should recognise certain constraints for the sake of the symbolic value of doing so remains a characteristically consequentialist argument, not one that can be happily endorsed by any adherents of Lockean rights.

¹⁶ Nozick, *Philosophical Explanations*, 495.

¹⁷ Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, Pb ed., with postscript, 1999. ed. 1997).

¹⁸ Nozick, *The Nature of Rationality* (Princeton, New Jersey: Princeton University Press, 1993).

¹⁹ *Ibid.*, 55-56.

A third response, and its problems

So what is the third response that non-consequentialists may make to the question as to why the principles they prize should be treated by the state as constraints, not as goals? The line I have in mind argues that there is something about acting on persons –specifically, perhaps, about the state’s acting on persons– that requires a commitment to treating relevant principles as constraints.

This is the line that Nozick actually takes when he himself addresses the question in *Anarchy, State and Utopia* as to why the state should treat Lockean principles as constraints. Where the state treats those principles as constraints, it denies itself the possibility of ever violating an individual’s right to X for the sake of maximising satisfaction of that right overall; where it treats them as goals, it retains the discretion to make such opportunistic violations. But, Nozick²⁰ argues, the state is required to respect each individual as a separate person –o treat them as an end, not merely as a means to achieving any distinct goal– and this requirement would be breached if the state retained the discretion to violate a given individual’s right to something, merely because that was the best path to minimising violation of that right overall. Thus the state that aims to treat people always as ends –in a word, to respect people– must treat the Lockean principles as constraints on its behaviour, not just as regulative goals. ‘Side constraints express the inviolability of others, in the ways they specify. These modes of inviolability are expressed by the following injunction: “Don’t use people in specified ways”’.²¹

Nozick has much of interest to say on the question of why it is important that people enjoy the sort of inviolability that they would have under a regime where everyone satisfies Lockean constraints. The line along which he is led is one that receives further development in other works.²² ‘I conjecture that the answer is connected with that elusive and difficult notion: the meaning of life. A person’s shaping of his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for meaningful life’.²³

²⁰ Nozick, *Anarchy, State and Utopia*, 30-33.

²¹ *Ibid.*, 32.

²² Nozick, *Philosophical Explanations*, Cap. 6.

²³ Nozick, *Anarchy, State and Utopia*, 50.

But to my consequentialist eye, this line of argument misses an obvious objection. I am happy to grant that the enjoyment of Locken inviolability is of the greatest importance to human beings, being connected with the possibility of having a meaningful life. But that in itself does not show that the state ought to honor Lockean constraints in cases where breaching them would be the best way of minimising violations of the constraints overall. It does not show that the state should treat the principles involved as constraints rather than as goals.

If people's enjoying non-violation of their rights is important, then it is important that they enjoy non-violation of those rights at anyone's hands, not just at the hands of the state. But why, then, shouldn't the desirability of such non-violation not allow the state to violate the rights of some people, if it can thereby increase the amount of non-violation that is enjoyed by people overall? It may compromise the possibility of those it affects having a meaningful life, but it will presumably facilitate the enjoyment of a meaningful life on the part of an even greater number of others.

Nozick and non-consequentialists generally need to do more than show that there is reason why the state should respect people as separate individuals, and not sacrifice them for the benefit of others. Consequentialists like me will certainly agree with that. They need to show, more specifically, that there is reason why the state should respect people as separate individuals, and not sacrifice them for the benefit of others, even when a certain form of sacrifice it might impose on some would be a way of blocking the imposition by third parties of an even greater level of sacrifice on others.

I hasten to add that I do not favour a policy under which the state might routinely impose harm on some in order to avoid others suffering an even greater harm—or a greater number of others suffering the same harm—at the hands of third parties. But my own reason for taking this view is not that constraints against harm have a sacred status as constraints, only that they have to be satisfied by any state that is likely to be able to promote certain palpable goods: say, the good of enjoying freedom as non-domination. My own reason, in short, is consequentialist in character.

I think that it is going to be very difficult for non-consequentialists, however, to hold the line against the challenge under discussion. They will have to produce a non-consequentialist argument for why the state should be bound to certain constraints, even when the principles enforced by the constraints can be more fully promoted by an opportunistic breach. And apart from rehearsing favoured mantras to the effect that two wrongs do not make

a right, it is hard to see what they can effectively do. The problems that arise for Nozick's argument will threaten any attempt on the same lines.

Non-consequentialists may appeal to intuition, of course, and argue that it is a datum of moral sense that it is just wrong for the state, or any agent, to resort to opportunistic breaches of whatever constraints are prescribed for the state. Nozick of *Anarchy, State, and Utopia* sometimes seems to take this line, as in the opening sentence of the book. 'Individuals have rights, and there are things no person or group may do to them (without violating their rights)'.²⁴ But appealing to intuition at this fundamental level is not going to make an impact on opponents and amounts to little more than a refusal to join debate.

3. THE SELECTION QUESTION: WHY TREAT THESE PRINCIPLES AS CONSTRAINTS?

The issue in general

The problem to be raised in this section is formulated in the same question that we addressed in the last section but with a different principle of emphasis. The question is no longer, why should the state treat relevant principles –say, those associated with Lockean rights– as constraints rather than as goals. Granted that some principles are to be treated as constraints, the question rather is, why should the state treat these principles in particular –these principles and not others– as constraints. Where the earlier issue is a question of why to treat the principles as constraints, here the question is how to select those principles that are to be given that sort of treatment.

The issue with property-rights in particular

The selection question is particularly pointed with the Lockean principles that Nozick discusses in *Anarchy, State, and Utopia*. He sets out the principles that he has in mind in this passage, discussing Locke's *Two Treatises of Government*.

Individuals in Locke's state of nature are in 'a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any other man' (sect.4). The bounds of the law of nature require that 'no one ought to harm another in his life, health, liberty, or possessions' (sect.6). Some persons transgress these bounds, 'invading others' rights and...doing hurt to one another,' and in response people may defend themselves or others against such invaders of rights (chap.3). The

²⁴ Ibid., ix.

injured party and his agents may recover from the offender 'so much as may make satisfaction for the harm he has suffered' (sect.10); 'everyone has a right to punish the transgressors of that law to such a degree as may hinder its violation' (sect.7); each person may, and may only retribute to {a criminal} so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint.²⁵

The Lockean state of nature, Nozick suggests, is 'a nonstate situation in which people generally satisfy moral constraints and generally act as they ought'.²⁶ And so the state will be justified, he tells us, to the extent that it would have arisen by a process involving no morally impermissible steps from that situation. The idea is that if we think that the Lockean principles –the principles displayed in Locke's state of nature– are morally compelling, then we will find the state that would emerge under Nozick's derivation as morally compelling, and certainly as morally permissible.

But what if we do not think that the Lockean principles are uniquely compelling? What if we are open to the possibility that certain other principles are morally superior? In that case Nozick's derivation will do nothing to persuade us that the state ought to treat the Lockean principles, as distinct from our preferred principles, as constraints– or indeed as goals. Even if we grant that some principles should be treated by the state as constraints, we will ask 'Why treat **these principles** as constraints?'

The Lockean principles allow of a variety of different interpretations –they constitute a family of different principles, not a single set– and in any case they are not the only principles that we might imagine people satisfying in a relatively peaceful, well-organised state of nature. The point is particularly obvious with the principles whereby people are said not to harm one another in their possessions. For it is notorious that the rights of property to which Locke directs us are not specified in unambiguous detail and are not the only rights of property to which we might consider holding a state.²⁷

Nozick himself, with characteristic candour, draws attention to the indeterminacies in Locke's formulation of property rights and to the alternative sets of rights that we might imagine. A system of property rights will determine the different titles to ownership and the discretion available to

²⁵ Ibid., 10.

²⁶ Ibid., 5.

²⁷ B. Williams, "The Minimal State", in J. Paul, ed., *Reading Nozick: Essays on Anarchy, State and Utopia*, (Rowman and Littlefield: Totowa, N.J., 1981), 32. Thomas M. Scanlon, "Nozick on Rights, Liberty and Property", in *Reading Nozick: Essays on Anarchy, State, and Utopia*, 124-26.

owners as to how the things they own may be used. Nozick makes clear that Locke is not unambiguous on either matter, as appears for example in the fact that the famous proviso on ownership –that there should be ‘enough and as good left in common for others’²⁸– can be interpreted in a number of different ways.

More importantly, however, Nozick also makes clear that there are many different possible systems of property rights possible, ranging from private systems of the kind illustrated by Locke to systems of collective property where ‘a group of persons living in an area jointly own the territory, or its mineral resources’.²⁹ He spells out some of the variations possible in the following passage.

The central core of the notion of a property right in X, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with X; the right to choose which of the constrained set of options concerning X shall be realized or attempted. The constraints are set by other principles or laws operating in the society; in our theory, by the Lockean rights people possess (under the minimal state)... This right of selecting the alternative to be realized from the constrained set of alternatives may be held by an **individual** or by a **group** with some procedure for reaching a joint decision; or the right may be passed back and forth, so that one year I decide what’s to become of X, and the next year you do (with the alternative of destruction, perhaps, being excluded). Or, during the same time period, some types of decisions about X may be made by me, others by you. And so on.³⁰

Given that many systems of property rights are possible, it is obvious that Nozick must face the question raised in this section as well as that which was raised in the last. Not only will he have to explain why the Lockean principles are to be treated by the state as constraints, and not as goals. He will also have to explain why it is the Lockean principles –in particular, the Lockean principles in property holding– that are selected for such treatment, and not some others.

The plausibility of a consequentialist answer

I suggested with the treatment question that the most plausible answer available will take us back to a consequentialist perspective. The best way of explaining why certain principles should be treated by the state as constraints is to show that only by doing this will the state be able to promote some

²⁸ Nozick, *Anarchy, State and Utopia*, 178.

²⁹ *Ibid.*

³⁰ *Ibid.*, 171.

important value or goal. I make a similar suggestion with the selection question. The best way of explaining why it is the Lockean principles in property that a state should treat as constraints, for example, will be by showing that if the state privileges the Lockean principles in that way it will do better in securing and advancing certain palpably desirable consequences than it would do by privileging any rival set.

Nozick himself draws attention at a number of points to how natural it is to think in consequentialist terms as we consider the question, crucial to political theory, as to which system of property rights should be put in place in a society. Thus he seems to tell us that what we need for assessing different systems is precisely the sort of theory that would give us information about the consequences each would have. Having said that a property right gives us a constrained set of uses an owner may make of something and an account of the exclusionary and shared ways in which ownership may be enjoyed, he goes on to add.

We lack an adequate, fruitful, analytical apparatus for classifying the types of constraints on the set of options among which choices are to be made, and the types of ways decision powers can be held, divided, and amalgamated. A theory of property would, among other things, contain such a classification of constraints and decision modes, and from a small number of principles would follow a host of interesting statements about the consequences and effects of certain combinations of constraints and modes of decision.³¹

A little later he even rehearses the consequential considerations by reference to which he thinks that a private as distinct from a collective system of ownership is to be justified:

It increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the principle and types of risks they wish to bear, leading to specialized types of risk-bearing; private property protects future persons by leading some to hold back resources from current consumption for future markets; it provides alternate sources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on.³²

Nozick maintains that within a Lockean theory these considerations serve to determine how we should understand the proviso that there should be

³¹ *Ibid.*, 171.

³² *Ibid.*, 177.

‘enough and as good left in common for others’. Within the theory, then, they are not designed to offer ‘a utilitarian justification of property’. But this comment says nothing to argue against the plausible idea that it is considerations of this kind that show why we should want the state to privilege Lockean principles in the first place, rather than principles of any other kind.

Nozick’s line of thought about property indicates why it is natural to try to resolve the question under discussion –the question of why the state should privilege these principles rather than those– on a consequentialist basis. The non-consequentialist commitment to having the state treat certain principles as constraints leaves the question as to why the theory should select the set of principles it actually selects from among the alternative sets possible. And a natural way to answer that question would be to say that at this level the theory goes consequentialist. While it maintains that the state should treat the principles as constraints, and not as goals –and is in this respect non-consequentialist– it selects the principles that it holds up as constraints on the grounds that the state’s treating them as constraints will do better in consequentialist terms than its treating any alternative principles as constraints.

Not only is a consequentialist answer to the selection question plausible, as it is plausible with the treatment question. One and the same consequentialist view can provide an answer at once to the two questions. Thus we may think that the goal of promoting something like freedom as non-domination justifies the state in selecting certain principles as those it ought to implement and that it requires the state to implement them in the fashion of constraints: any attempt to treat them as goals is likely to be counter-productive.

The problem that we have been discussing in connection with property-rights arises also in regard to other rights that non-consequentialists will want to have the state respect. As there are many different systems of property rights, so there are many different systems of rights related to liberty and even life. The literature on the different interpretations of liberty and on the different ways of understanding rights to life shows that, as there is no easy response to the selection problem in the case of property, so there is going to be no easy response to it in these areas either. And what is true of life, liberty and property is going to be true in even greater measure for those principles related to reducing and rectifying offences against life, liberty and property. In every case there are going to be many possible sets of principles available for the state to treat as constraints –or as goals– and in each case, then, there will be a substantial question as to which set should be preferred.

Contractualism does not offer a sustainable alternative

We might well leave the discussion at this point but opponents will argue that I should look beyond Nozick's work for other ways in which the selection question might be treated by non-consequentialist. Is there any distinctively non-consequentialist way, then, in which political philosophy might hope to argue that certain principles, and not others, should be selected for being made into constraints on the state?

One familiar line will be that if the state –or the people or the society or the tradition or whatever– has bound itself in an historical contract to honouring certain constraints, then that will provide a non-consequentialist basis of selection. I am happy enough to concede the point, at least for present purposes. The concession is not going to provide any consolation for non-consequentialists, for no people in history is on record as having made the sort of contract that would be required.

This observation leads, however, to the obvious question. Might hypothetical contracts serve to justify the selection of certain principles in a non-consequentialist way? John Rawls argues in *A Theory of Justice* that the state should be constrained by certain principles of justice, because these are principles we would each have chosen to constrain it by, in the so-called original position: in the position where we choose social arrangements under a veil of ignorance as to our chances of doing well or badly under the arrangement chosen. And in a related manner Tim Scanlon³³ suggests that the right principles by which to constrain the state are, roughly, those to which no one could raise an intuitively reasonable objection within an enterprise of mutual cooperation. Might such approaches give non-consequentialists a way of dealing with the selection issue?

I think not. The first thing to observe is that that any such approach will inevitably identify a general feature that some principles have and others lack, and will recommend the principles that have it over those that don't. In Rawls's case, the feature by which his principles of justice are singled out as principles the state should treat as constraints is that they are fair: in particular, fair in the sense in which the fact that they would be chosen under a veil of ignorance testifies to their fairness. In Scanlon's case, the feature by which any proposed principles would be singled out is the fact that they are mutually justifiable in a distinctive way: no one could reasonably object to them as a

³³ Scanlon, *What We Owe To Each Other* (Cambridge, Massachusetts: Harvard University Press, 1998).

basis of cooperation. (There is a question in interpreting Scanlon as to whether the justifiability of principles in this sense is the property of being substantially such that no one could reasonably object to them as a basis of cooperation or the purely subjunctive property of being such that, without any substantive base explaining the fact, no one could reasonably object.³⁴ But that difference in possible construal is not relevant for present purposes.)

Given that any hypothetical contractual procedure will select and recommend certain principles on the grounds that they possess a general property of some sort, we can state the problem with arguing that hypothetical contracts can provide a non-consequentialist answer to the selection question. The property envisaged –say, fairness or mutual justifiability– is presumably one that the principles selected are held to realise in a manner than makes them preferable to alternatives. Organise the state and the society around this set of principles, so the idea must be, and there will be more fairness or mutual justifiability than would obtain under any of the alternatives. But the rationale for selecting the principles, stated in this way, is clearly consequentialist. The hypothetical contract favoured articulates what is thought to be the crucial property to look for in relevant principles –Rawls’s contract articulates one property, Scanlon’s another– and the principles actually recommended are selected on the grounds of promising to promote that property best.

In identifying the principles that will serve fairness or mutual justifiability best, there is a tendency to do ideal theory: to identify the principles that would serve best under conditions of universal acceptance and compliance. But this does not take away from the point I am making. Rawls’s contractors ask in the original position after which principles they would rationally prefer to have operate in an ideal society and he argues that they would prefer the two principles of justice; they would require officials of the state, and ordinary citizens, to treat those principles as constraints. But the contractors might well give a different answer to the question as to which principles they would rationally prefer to have operate in a society that is said to incorporate such and such shortfalls from ideal acceptance and compliance. Were they as rational as Rawls supposes –and regardless of whether they maximise or maximin– then presumably they would opt for the principles that would do best by fairness in that particular world.

³⁴ Pettit, “Two Construals of Scanlon’s Contractualism”, *Journal of Philosophy* 97 (2000): 148-64.

Rawls will argue of course –and Scanlon will argue in an analogous way– that the principles which ought to be treated as constraints in the actual, imperfect world are those that would maximise fairness in an ideal society, even though when they do not maximise fairness in the actual one. But what argument is available in support of this line? If what matters is fairness or mutual justifiability, and if there is more of it to be had in the actual world by imposing one set of principles rather any other, then why not go for that better-performing set of principles? Why not do so, even if another set would have done better in the non-actual world envisaged in ideal theory? All of the arguments rehearsed in discussing the treatment question are available at this point to deny hypothetical contractarians the possibility of arguing that they have a sustainable, non-consequentialist basis for dealing with the selection issue.

Another perspective on this critique of contractualism

For those who are not persuaded of these remarks on contractualism, I add a further, deeper-running line of criticism. This is not essential to my purposes but it may help to persuade some sceptical readers that the position I am taking has a good deal to be said for it.

In my earlier characterisation of non-consequentialism and consequentialism I argued that while each approach embraces general principles –neither privileges any person or place or other entity by name– the first argues that agents ought to instantiate such principles, treating them as constraints, the second that it ought to promote them in the manner of goals. This means that from the point of view of the agent who conforms to a non-consequentialist theory, whether a certain scenario is to be preferred to another –whether it is better in moral terms from his or her point of view– will depend on how that agent behaves in that scenario: on what principles they instantiate in their behaviour. Looking at two abstractly described scenarios, then, this agent will not be able to form a moral preference as to which should be brought about before learning who he or she is in those scenarios: before turning the abstract scenarios into centred scenarios where the person is identified as this or that agent. By contrast, of course, the agent who conforms to consequentialist theory will be able to rank abstract scenarios without reference to who he or she is; the morally preferable scenario will be that in which the preferred principles are maximally realised, even if in that scenario they are the agent who does least well by those principles.

Let us agree, then, that non-consequentialism cannot rank abstract scenarios, only centred ones. It cannot rank possible ways things might be

except from the point of view of an agent whose identity and role in each of the different situations under assessment is fixed and manifest. The lesson gives us another, useful perspective on the question of whether contractualist approaches to the selection question are genuinely non-consequentialist.

I argue that they are not, on the grounds that those approaches are all meant to provide us with the ability to rank abstract scenarios. We are invited to endorse a contractually articulated ideal like fairness or mutual justifiability and to rank the abstract scenarios associated with different sets of principles in terms of the ideal. But this exercise is exactly the sort of assessment that non-consequentialists, with their emphasis on how a designated agent does by way of instantiating a certain ideal, cannot endorse. It belongs firmly in the camp of consequentialist approaches.

Notice, by contrast, that historical contractualism would provide a non-consequentialist line on the selection question by the criterion I am introducing; the problem here is that there are no historical contracts available for non-consequentialists to invoke. Were we to identify ourselves as a people or society or state –as a collective agent of an intertemporally stable variety– and were we to have made an historical contract of some kind in the past, then we could argue that from our point of view the centred scenario in which we remain faithful to that contract –impose principles of the kind supported by the contract– is to be preferred to all others. In arguing this we would be thinking in a distinctively non-consequentialist way, abjuring any ability to assess abstract scenarios and any interest in pursuing assessment of that sort. We would be operating on a non-consequentialist basis in dealing with the question as to which principles ought to be selected as the principles that officials of the state, and ordinary citizens, ought to treat as constraints.

Hypothetical contractarians cannot help themselves to any argument of this kind. They might claim to focus on the state or the people as a collective agent and to ask in a non-consequentialist way as to why that agent should select certain principles to impose on itself as constraints. But if it can argue for the selection of one set of principles over others only on the grounds that those principles would have been chosen in a certain counterfactual situation, even chosen by that very state or people, then that is not going to provide a basis of obligation akin to the obligation imposed, intuitively, by an historical contract. Why should any agent think itself constrained in a non-consequentialist way by a contract it would have made in certain circumstances, as distinct from a contract that it made in the course of its actual history?

The issue arises for non-consequentialism in ethics as well as politics

I have been arguing that whereas there is a natural, consequentialist answer available for the selection question, as there is an answer of this kind available for the treatment issue, there is no reply available that looks to be at once plausible and non-consequentialist. The difficulty, I want to stress, is not just a technical one. It stems from a very deep feature of non-consequentialism and in order to emphasise that claim I end by considering a way in which it surfaces for non-consequentialism in ethics generally, not just in political philosophy.

Every non-consequentialist position takes a given set of principles as established or authoritative and argues that those principles ought to be treated as constraints, not as goals. The principles in question may be principles whereby parents pay special attention to their children, friends care for one another in a distinctive way, those who make promises give privileged consideration to the promisees, people who are engaged directly with others acknowledge the claims of those others in a way that privileges them over third parties, and so on. There is a clear issue as to whether such principles should be treated as constraints on the parties immersed in the relevant practices, or whether they should be treated as goals. This is an issue that arises within the practices in question, be they practices of parenting, friendship, promise-keeping or face-to-face civility. But that internal issue is paralleled by an external question to do with whether the principles and practices in question should indeed be taken as given principles, already established or authoritative. This is the selection question as distinct from the treatment question.

Should we have an insulated family sphere or expose that sphere in greater measure to initiatives within civil society? Should we institute or sustain principles of friendship that allow friends to make claims on one another that are detrimental in various ways to the interests of third parties? Should we make promise-keeping sacred to the point that people may be forced to keep even promises or contracts that beggar them? These are all instances of the selection question, though they are raised now in a context that is not distinctively political. The questions are serious and can hardly be ignored by any one who claims to be committed to the moral enterprise.

Yet those questions, so it appears to me, do not allow of resolution along non-consequentialist lines. For what distinguishes non-consequentialism is the insistence on the fact that it is morally right to instantiate certain principles rather than to promote them; or, more generally, an insistence that the moral

point of view allows the assessment of centred but not of abstract scenarios. And non-consequentialism in that sense has to give way to consequentialism when it comes to the question of which principles should be selected as fit to be treated as constraints, whether in this area or in that. As the selection problem confounds non-consequentialism in political philosophy, then, so it confounds non-consequentialism more generally. Non-consequentialists may keep putting off recourse to consequentialist considerations. But if they are serious about pursuing questions of justification to the limit, they cannot put it off forever.

Philip Pettit
034 Corwin Hall,
Princeton University,
Princeton, NJ 08544-1012
ESTADOS UNIDOS
E-mail: ppettit@Princeton.EDU

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