Robert Nozick did political theory a great service when he showed how a theory of natural rights, such as John Locke’s endorsed, could be invoked in defense of a libertarian theory of the state, in particular, could be invoked in defense 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 of a rights-based defense of the minimal, libertarian state.

But there are two challenges that the invocation of natural rights in defense 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 defense 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 content in this chapter 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 society. 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 surprising 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 assignment 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 principles in particular, and not some other set, as constraints. I call this the selection problem, since it focuses 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 behavior 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 behavior. 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 certain ways 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 behavior 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 egotistic 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 behavior 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 pervasiveness of the agent's circumstances, that the principle will be less fully realized 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 behavior or relationships or, if this is thought relevant, psychology. And it insists that the state ought to instantiate such a principle even if it does so means, because of the pervasiveness of circumstances, that the principle will be less satisfied in the world as a whole: a state, less satisfied among its own citizens.

Consequentialism takes two steps away from this position in ethics and politics. 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 behavior or relationships or psychology that the non-consequentialist favors; 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 maximized, 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 realization of such values or principles. Promoting overall realization may mean acting in a way that actually leads to the highest level of realization or acting in a way that maximizes the expected level of realization; 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.

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 realization 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 in their behavior 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 ASU. The core idea appears in his contrast between goal-centered and constraint-centered theories. The goal-centered or consequentialist theory holds up various patterns that ought to be advanced by agents. The constraint-centered 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 (ASU, 10). He argues that to be a rights theorist in the Lockeian 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 behavior toward other agents, in particular toward 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 realization 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" (ASU, 29).

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. 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 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 maximizing 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 enunciating a theory of rights in the project, 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 behavior or relationships or psychology. This is "something like a utilitarianism about rights," Nozick (ASU, 28) 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 populating 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 characterization of non-consequentialism and use this to make clear what is involved in holding the state to Lockeian rights. He also raises in the sharpest possible way the problem that any such rights theory must face: that of showing that whereas Locke's 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" (ASU, 4). His deservedly celebrated answer to that question is that if we imagine a Lockeian 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 establish something close to the minimal state. I have discussed this argument elsewhere and won't address it further here."
2. THE TREATMENT QUESTION: WHY THESE PRINCIPLES

The Issue

How will consequentialists react to non-consequentialism in political theory? Specifically, what will they react to the claim that certain principles—say, the principles associated with Locke’s theories—have to be included in the set of constitutional principles? The non consequentialist would likely react with a question: Why those principles? What is the justification for including these principles in the set of constitutional principles? One answer is that the principles they promote—of preference for Locke’s rights—are principles that are valued in their own right. These rights are considered to be fundamental or essential principles that should be protected and respected.

The question for Laws, then, is why Locke’s rights that he prizes are to be included in the set of constitutional principles. Locke’s rights—property and liberty—are fundamental rights that are valued in their own right. These rights are considered to be essential principles that should be protected and respected.

We can now turn to the question of how these principles can be promoted. The principle of liberty can be promoted by ensuring that the individual has the opportunity to pursue their own goals and interests. The principle of property can be promoted by ensuring that the individual has the opportunity to own and control their own resources.

Two Responses: Those That Collapse into Consequentialism

There are three responses to the question of how these principles can be promoted. First, some consequentialists might argue that the principles should be included in the set of constitutional principles because they promote the greatest good for the greatest number. This response is based on the idea that the principles should be included in the set of constitutional principles because they promote the greatest good for the greatest number.

One possible response to this is that the principles should be included in the set of constitutional principles because they promote the greatest good for the greatest number. This response is based on the idea that the principles should be included in the set of constitutional principles because they promote the greatest good for the greatest number.

In conclusion, the question of how these principles can be promoted is a complex one. It requires a careful consideration of the principles themselves and their potential impact on society. The principles should be included in the set of constitutional principles because they promote the greatest good for the greatest number.
A Third Hypothesis and Its Problems

So what is the third hypothesis? That non-constitutional principles may make the state so much less valuable as a constitutional or legal entity that non-constitutional principles are effective in a way that non-constitutional principles are not. The question as to why the principles may be effective should be treated as a constitutional issue. The state is an end in itself, not a means to an end. The state is valuable in its own right, not because it is the means to an end. The state is valuable as a constitutional or legal entity, not because it is the means to an end.

This is the third hypothesis. This is the line that Nussbaum actually takes when he addresses the question of why, as he himself addresses the question in chapter 6, the state should be constitutional in form, that is, as an end in itself, and as a means to an end, not as a means to other ends. The state is valuable as a constitutional or legal entity, not because it is the means to an end. The state is valuable in its own right, not because it is the means to an end. The state is valuable as a constitutional or legal entity, not because it is the means to other ends. The state is valuable in its own right, not because it is the means to other ends.

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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 minimizing 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 constitutive of its behavior, 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’” (ASU, 32).

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 (PE, Ch. 6).

“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” (ASU, 50).

But to the consequentialist eye, this line of argument misses an obvious objection. I am happy to grant that the enjoyment of Lockean 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 minimizing 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 in 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 certainly will 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 favor 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 favored 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)” (ASU, ix). 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 Lockeian principles that Nozick discusses in Anarchy, State, and Utopia. He saw not the principles 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” (§4). The bounds of the law of nature require that “no one ought to harm another in his life, health, liberty, or possessions” (§6). Some persons transgress these bounds, “invading others’ rights and . . . doing harm to one another,” and in response people may defend themselves or others against such invaders of rights (Ch. 3).

The injured party and his agents may recover from the offender “so much as may make satisfaction for the harm he has suffered” (§10); “everyone has a right to punish the transgressors of that law to such a degree as may hinder its violation” (§7); each person may, and may only “contribute 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 restrain.

The Locke state of nature, Nozick suggests, is “a nonstate situation in which people generally satisfy moral constraints and generally act as they ought” (ASU, 5). 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 Lockeian 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 Lockeian 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 Lockeian 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 Lockeian 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-organized 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.”

Nozick himself, with characteristic candor, 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 rights to ownership and the different, available to others 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” (ASU, 178-83) can be interpreted in a number of different ways.

More important, 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” (ASU, 178). 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 Lockeian 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 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. (ASU, 171)
Given this many systems of property rights are possible, it is obvious that Naca's must face the question of whether, or on what grounds, the Lockeans principles, in particular, should have the status of being a property holding. The best way to explain why the Lockeans principles are in fact a property holding is to draw attention to what was said about the rights in property for which the Lockeans principles are a property holding.

What we need to do in order to determine how we choose the proper answer of whether, or on what grounds, the Lockeans principles should be a property holding. The best way to explain why the Lockeans principles is in fact a property holding is to draw attention to what was said about the rights in property for which the Lockeans principles are a property holding.

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the failure of constraints: any attempt to treat them as goals is likely to be counterproductive. Moreover, we have been discussing in connection with property what we might call the state-expectation: if the state has certain rights or if we have certain rights in the state, then we are in a better position to understand what those rights entail and to apply them in a way that is consistent with our own interests.

The following illustrates the point. If the state has certain rights, then it can reasonably be expected to respect those rights. If we have certain rights, then we can reasonably be expected to respect those rights as well. In either case, the state and our own interests are likely to be aligned, and we can reasonably expect that the rights will be respected.

This illustrates the importance of understanding the nature of the state and of the rights that it has. It also illustrates the importance of respecting those rights in order to ensure that the state will respect our own rights.

The following is an excerpt from a legal document:

"The property owner's complaint is based on a property ownership case. The complaint is a request for a court order to enforce the property owner's rights. The complaint is based on a claim of title to the property. The complaint is supported by evidence of ownership. The complaint seeks an order for specific performance. The complaint is supported by evidence of ownership. The complaint seeks an order for specific performance.

We might include the following points in our discussion:

- The property owner's complaint is based on a property ownership case. The complaint is a request for a court order to enforce the property owner's rights. The complaint is based on a claim of title to the property. The complaint is supported by evidence of ownership. The complaint seeks an order for specific performance. The complaint is supported by evidence of ownership. The complaint seeks an order for specific performance.

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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 shortcuts from ideal acceptance and compliance. Contractualists in the spirit of Rawls should presumably hope that they would opt for the principles that would do best by fairness in that particular world.

Rawls will, of course – and Scanlon may argue in an analogous way – that the principles that ought to be treated as constraints in the actual, imperfect world are those that would maximize fairness in an ideal society, even though when they do not maximize 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 contractualists 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 skeptical readers that the position I am taking has a good deal to be said for it.

In my earlier characterization of non-consequentialism and consequen-
tialism 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 behavior. 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 centered 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 realized, 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 sce-
narios, only centered 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 contractual-
ist 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 contractualistically 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 intro-
ducing: the problem here is that there are no historical contracts available for non-consequentialists to invoke. Were we to identify ourselves as a peo-
pel 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 centered 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 argu-
ning 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 contractualists 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
Philipp Pettit

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 in Ethics Generally

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 emphasize 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 these 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 promises, 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, in insistence that the moral point of view allows the assessment of centered 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.

Notes


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6 Goals, Symbols, Principles: Nozick on Practical Rationality*

GERALD F. GANS

1. A PUZZLE: THE RELATION BETWEEN NOZICK’S THEORY OF PRACTICAL REASON AND HIS LIBERTARIANISM

Although Robert Nozick has made seminal contributions to many areas of philosophy – value theory, ethics, the philosophy of science, epistemology, and metaphysics, to name just a few – the libertarian political philosophy articulated in *Anarchy, State, and Utopia* remains the most famous.1 It is not clear precisely what is his current evaluation of that libertarian philosophy, but in two important passages in the late 1980s and early 1990s, he partially disavowed it. In *The Examined Life*, he wrote:

> Within the operation of democratic institutions ... we want expressions of the values that concern us and bind us together. The libertarian position I once propounded now seems to me seriously inadequate, in part because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into the social fabric. ... There are some things we choose to do together through government in solemn marking of our human solidarity. ... 1

In *The Nature of Rationality*, he makes a similar observation:

> Symbolic meaning ... is a component of particular ethical decisions. ... It has been argued that the symbolic meaning of feeding someone, giving sustenance, enters into the discussion of the ways in which the lives of direly ill people permissibly may be terminated – turning off their artificial respirator

* Versions of this chapter were presented to the International Society for Unitarian Studies, The International Economics and Philosophy Society, The American Political Science Association, and to the Law Faculty at Universidad Torcuato Di Tella. I would like to thank Scott Arnold, Joshua Cohen, Ben Eggleston, Jonathan D. Haidt, Benjamin Gregg, Eric Mack, Douglas MacLean, Guido Piccone, Geoff Sayre-Mccord, David Schmith, Horacio Spector, and Fernando Tovar for their comments and suggestions.