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# ANALYSIS

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of the sort urged by Devitt [2] and Lewis [4], then *any* claim in an Ideal Theory that transcends what is strictly dictated by operational constraints may be false.

*University of Western Ontario,  
London, Ontario, Canada N6A 3K7*

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#### RIGHTS, CONSTRAINTS AND TRUMPS

By PHILIP PETTIT

**I**N *Anarchy, State, and Utopia*, published in 1974, Robert Nozick argued that rights should be understood as constraints [2]. In *Taking Rights Seriously*, published three years later, Ronald Dworkin maintained that we should conceive of rights as trumps [1]. How do these claims relate to one another? Are they incompatible? Are they consistent but distinct? Or are they perhaps equivalent?

I wish to argue that they are equivalent. Although the claims are associated with rather different normative theories of rights, they amount to one and the same analytical thesis.

My paper is in three sections. In the first I show that if a right is a constraint then it is also a trump and that if it is a trump it is also a constraint; the two claims are equivalent. In the second I distinguish two propositions associated with each claim, suggesting that the constraint formula highlights one, the trump formula the other. And then in the final section I identify what I believe is the

motivating ground for the two propositions: the belief that rights serve their bearers in an essentially protective role.

#### I CONSTRAINTS ARE TRUMPS, TRUMPS CONSTRAINTS

Robert Nozick introduces his conception of rights by setting up a contrast between rights considered as goals and rights considered as constraints. If the right to *X* is considered as goal, then one is obliged to violate *A*'s right to *X* when doing so increases non-violation overall: that is, non-violation by people generally of the right to *X* on the part of people generally. If it is considered as a constraint, then this is not so. On the contrary, one is obliged not to violate *A*'s right even in such a circumstance. (It is significant that the non-violation which one is not allowed to promote under this conception of rights — and under Dworkin's — is non-violation by people generally (not by oneself) and of people generally (not of the holder of the right). That one may violate *A* in order to promote non-violation by oneself is intelligible because in such a case the rights with which one is faced are inconsistent. That one may violate *A* in order to promote non-violation of *A* is intelligible if, as is argued in section 3, the point of rights is to protect the interests of those who hold them.)

The constraint conception of rights means that one sees *A*'s right to *X*, not as part of an overall goal — the reduction of violation by anyone of anyone's right to *X* — but as something which binds one regardless of how that goal is served. This conception does not entail, notice, that rights bind the agent regardless of how all other goals are served; strictly, it says nothing on the status of rights vis-à-vis independent aims. But as it happens Nozick endorses the claim that rights have priority over all goals, at least under normal circumstances, and he often presents the constraint conception of rights in the context of that claim. 'The side-constraint view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society' ([2] p. 29).

Ronald Dworkin introduces the conception of rights as trumps by focusing on the role which rights play — or, as he thinks, ought to play — in controlling the demands of collective goals. A collective goal, typically the sort of thing that governments pursue, is an aggregate social benefit: economic efficiency, equality in opportunity, or whatever. An individual's rights, on Dworkin's conception, serve to protect her from certain sorts of treatment which the untrammelled promotion of such a goal might require. 'Rights act as trumps over some background justification that appeals to the collective welfare' ([1] p. 367).

I maintain that constraints are trumps and, conversely, that trumps are constraints. In defending this thesis, and in bolstering it

in the next two sections, I will be offering further explication and elaboration of Nozick's and Dworkin's views. I realize that the characterization just given is inadequate in a number of ways.

First, then, to the claim that constraints are trumps. A constraint such as that which the right to  $X$  is meant to provide serves to protect the individual from the demands of the following collective goal: the reduction of violation by people generally of the right to  $X$  on the part of people generally. In this respect therefore such a constraint is a trump held by the individual which he can use to control the demands of that goal.

Nozick thinks, as I have suggested already, that the constraint provided by a right will do even better than this by the individual. He thinks that it will serve to trump the demands of any goal and therefore the demands of any collective goal. A constraint in this view of things constitutes a total trump, as we might say. Or at least a total trump under normal conditions, for Nozick suggests that rights may be suspended when there is a threat of moral catastrophe ([2] p. 30n).

So far as a right is a constraint, then, it must also be a trump, whether a partial or total trump. But what of the converse claim? Does the fact that a right is a trump mean that it is also a constraint?

If the right to  $X$  is presented as a trump, then that means that it protects the individual from the demands of at least certain collective goals. As Dworkin says, 'no alleged right is a right (on my account) unless it overrides at least a marginal case of a general collective justification' ([11] p. 366). The question then is whether such a trump necessarily overrides the demands of the following collective goal: the reduction of the violation by people generally of the right to  $X$  on the part of people generally. If it does, then trumps are always constraints; if it does not, trumps may fail to be constraints.

On Dworkin's conception of trumps, they do always serve a constraining role. There are two pieces of evidence for this. One is internal to the characterization of trumps, the other is external to it.

The internal evidence is that trumps are meant to protect individuals, for they could scarcely be hailed for this feature if the goals they trumped did not include the goal of reducing overall violation of the right in question. If the right to  $X$  trumps certain other goals but is not a constraint in Nozick's sense, then it has the status of a collective goal which is given infinite weight against those other goals; otherwise put, it is a lexicographically prior collective goal. With such a status, the right to  $X$  may be held to protect  $X$ , whether  $X$  be liberty of speech, equality of opportunity, or whatever. It cannot so obviously be said to protect any particular individual however, since the promotion of the right to  $X$  may now require the denial of that right to this or that person.

The external evidence for saying that trumps in Dworkin's sense are constraints is clinching. It comes from a discussion of his con-

ception of rights in which Dworkin varies his usual terminology. What he says is that  $A$  has the right to  $X$  so far as the goal of  $A$ 's enjoying  $X$  has a privileged status vis-à-vis certain other goals. The important thing is that the goal of  $A$ 's enjoying  $X$  has this status, not the goal of a maximum number of people's doing so. For if the goal of  $A$ 's enjoying  $X$  serves as a trump — we know independently that this is what the privileged status involves — then this means that  $A$ 's right to  $X$  is a constraint. 'A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favour of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served' ([11] p. 91).

I conclude that constraints are trumps and trumps constraints. There are important differences in the normative theories of rights which Nozick and Dworkin defend, since they diverge on the source of rights, the range of rights, and the related issue of whether or not rights should be seen as total trumps. But these differences do not affect their agreement on matters of definition. They defend an analytical conception of rights which is capable of being invoked under a variety of normative approaches (see [3] and [4]).

## II THE TWO SIDES TO THE CONSTRAINT-TRUMP CONCEPTION OF RIGHTS

Our argument for the equivalence of Nozick's and Dworkin's conceptions of a right has brought towards the surface something which it is worth highlighting. This is that there are really two propositions associated with the thesis that rights are constraints or trumps. One of these propositions is given prominence by the metaphor of the constraint, the other by the metaphor of the trump.

The first proposition is that a claim such as the right to  $X$  is untradable across persons. It constitutes a distinct demand on the part of each bearer; it is, as we might say, a personalized claim. This proposition is explicit in the description of rights as constraints but it is also implicit, as we have seen, in their characterization as trumps. It means that the fact that violating  $A$ 's right to  $X$  would reduce violation by others of others' rights to  $X$  does not legitimize the act of violation.  $A$ 's right to  $X$  is not subject to such negotiation; it is incommensurable with other people's right to  $X$ .

The second proposition involved in the constraint-trump conception is that any right, or at least any right worth its salt, is not just untradable across persons, but also untradable against certain other goods. The right is given an infinite weight in competition

with those goods; only when it is satisfied is one entitled to concern oneself with the promotion of such benefits. This proposition depicts rights as claims that are privileged as well as personalized. It is not strictly implied in the characterization of a right as a constraint or trump, since a claim will count as a constraint or trump just in virtue of being personalized. But the proposition is strongly enough associated with the conception — and in particular with the trump formulation — to be identified as a component of it.

The conception of rights shared by Nozick and Dworkin may be summed up then as the view that rights are simultaneously personalized and privileged claims. These two elements are clearly present in the assumptions of each, as our discussion in the last section will have brought out. And yet the elements are equally clearly distinct. A claim might be personalized without being privileged in any way against the requirements of other goods. And a claim might be privileged to one or another extent without being personalized: it would amount in that case to an aggregate good which was given infinite weight or lexicographic priority in competition with the goods over which it was privileged.

One advantage of explicating the shared conception of rights in this way is that it also enables us to pinpoint the normative divergence between Nozick and Dworkin. Both agree that all rights must be privileged in some degree but they take different views of the extent of the privilege that is actually involved. For Dworkin it is such that the right trumps a certain unspecified number of collective goals; for Nozick it is such that the right trumps all.

### III THE UNITY OF THE CONSTRAINT-TRUMP CONCEPTION OF RIGHTS

The fact that their conception of rights has these two distinct elements raises the question whether Nozick and Dworkin are not running two essentially distinct conceptions together. I would like to conclude by arguing that they are not. I believe that the two elements fall out of a common and unifying notion of the role that rights do or ought to play in relation to their bearers.

A person's rights are on a par with her desires, or needs, or merits, so far as they constitute considerations that others are expected to take into account in certain sorts of behaviour towards that person. Like those other factors her rights constitute claims whose satisfaction is in the interest of the bearer in some sense.

But claims like rights, desires, needs and the like may serve a person's interests in one of at least two different ways. They may be designed to ensure that others take account of the bearer's interests in their deliberations or, more strongly, in their doings: not all their doings perhaps, but at least doings that occur under certain conditions. I may consider someone's interest in my deliberations and yet, for reasons of overall optimization, override

them in what I ultimately decide to do. If I am required to take account of those interests not just in how I deliberate, but in what I actually do — universally or under certain conditions — then I have no such leeway. I must cater for the person's interests in the minimal measure required if, intuitively, they are to be satisfied.

Claims which ensure that a bearer's interests are taken into account at the level of deliberation, and only at that level, serve, we may say, to promote the person. Claims which ensure the more substantial response serve, in contrast, actually to protect the bearer: specifically, to protect her from all or some actions on the part of others that would be inimical to the interests involved. Claims of the promotional sort guarantee a certain sort of consideration for the bearer; claims of the protective sort guarantee a certain sort of treatment.

I believe that what unifies the constraint-trump conception of rights is the assumption that rights serve their bearers in a protective rather than just a promotional role. The reason is that if a person is to be protected rather than just promoted, then it is natural that she be credited with claims that are at once personalized and privileged. This can be fairly readily demonstrated.

If *A*'s claim to *X* serves her in a protective role then that means that there is a reason for others, in the absence of the claim, not to provide her with *X*. The reason against which the claim protects *A* will be *X*-related or *X*-unrelated. It will arise from the fact that providing *X* for *A* militates either against the goal of reducing overall violation of people's claim to *X* or against some independent goal, *G*. Through being personalized, *A*'s claim to *X* will protect her against the first sort of reason; through being privileged, it will protect her against the second, or at least against certain forms of the second.

This does not quite show that it is natural to see rights as personalized and privileged if one thinks that they have a protective role. We also need to establish that protection cannot be provided by claims of a weaker sort.

The need is pressing. For it may seem that *A* can be protected against the influence of both *X*-related and *X*-unrelated reasons by something less than the fully personalized and privileged claim. Suppose she had a claim which protected her against the promotion by however small a margin of the *X*-related and *X*-unrelated goals but which did not protect her against the possibility of promoting either goal by some substantial degree, *K*. Wouldn't such a part-personalized and part-privileged claim still provide protection as distinct from promotion?

It would. But that fact is no objection, since every part-personalized claim is equivalent to a fully personalized counterpart, every part-privileged claim equivalent to a fully privileged counterpart.

The part-personalized claim to *X* is equivalent to the claim to benign  $X - BX$ , for short — where *X* ceases to be benign when its

enjoyment means that the goal of reducing overall violation of the claim to  $X$  is sacrificed to degree  $K$  or beyond. And if the claim to  $X$  is part-personalized, then the claim to  $BX$  is fully personalized. For consider the situation if a person can invoke a claim to  $BX$  — she can enjoy  $X$  without causing a disadvantage of degree  $K$  — but the claim is not fully personalized. In such a situation the person may be denied  $X$  for the sake of a benefit to others which is less than degree  $K$ . And that means that in that situation not only is the claim to  $BX$  not fully personalized; neither is the claim to  $X$  part-personalized. Thus, if the claim to  $X$  is part-personalized then the equivalent claim to  $BX$  must be fully personalized.

A similar argument shows that a claim to  $X$  which is part-privileged with respect to a goal,  $G$ , is equivalent to a fully privileged counterpart. The fully privileged claim will be to an  $X$  that is benign from the point of view of  $G$  —  $GBX$ , for short — where  $X$  loses such benignity when it means a sacrifice of  $G$  to degree  $K$  or more.

I conclude that given the view that rights play a protective role, it is quite natural to see them as at once personalized and privileged claims. Despite its distinct aspects then, the constraint-trump conception of rights has the sort of unity that we ought to require of a satisfactory analysis.<sup>1</sup>

*Research School of Social Sciences,  
Australian National University,  
Canberra, A.C.T. 2601, Australia*

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<sup>1</sup> I benefited from comments received from Alan Hamlin and from an anonymous referee and am grateful to both. I wrote the final version of the piece when I held an Overseas Fellowship at Churchill College, Cambridge and I am also grateful to the College for the facilities with which I was provided.

## DESERT AND ENTITLEMENT: A RAWLSIAN CONSEQUENTIALIST ACCOUNT

By DAVID CUMMISKEY

I RAWLS, NOZICK, AND FEINBERG ON DESERT AND ENTITLEMENT

RAWLS claims that we have no natural entitlement to the benefits generated by superior natural talents and abilities. To allow distributive shares of primary social goods to be determined by natural talents and abilities, he argues, is to let people's life prospects be determined by factors that are arbitrary from a moral point of view. We should, instead, agree 'to regard the distribution of natural talents as a common asset and to share in this distribution whatever it turns out to be' ([3] p. 101). I will refer to this as 'the common assets thesis'. Nozick responds by arguing that 'it needn't be that the foundations underlying desert are themselves deserved, *all the way down*'. He claims that we just may *have*, *not illegitimately*, some of the things or characteristics we use in coming to deserve something ([2] p. 225). Our natural talents and abilities are simply things we have, not illegitimately. And, since it is we that have them, why, he asks, are we not entitled to the benefits that are generated by them? It does not follow from the moral arbitrariness of this distribution that it may be treated as a common asset. Indeed, the very considerations supposed to show that we are not individually entitled to these assets would also show that we are not jointly entitled to the benefits. The natural distribution may be arbitrary and undeserved, but it is nonetheless the natural distribution. If no one has a claim on the pool of natural assets, then why should not those who fortuitously have these talents and abilities benefit from them?

Nozick's thesis, about the foundations of desert, is rather plausible and it does provide *some* support for his conclusion that those who fortuitously have the talents and abilities are entitled to the benefits that flow from them. Nonetheless I will argue that Rawls can, and does, accept the thesis that the foundations of desert need not be themselves deserved, and that Rawls can meet whatever burden of proof this shifts on to him. In order to demonstrate both the accuracy of Nozick's thesis about the foundations of desert and my claim that it is acceptable to Rawls, let us look more closely at the concept of desert.

Joel Feinberg has argued (i) that all attributions of personal desert must have a basis, and (ii) that the basis of a subject's desert must always be some factor about that subject. These two theses help clarify Nozick's thesis. (i) First, 'it is necessary that a person's desert have a basis' ([1] p. 61). 'Desert without a basis simply is not desert' ([1] p. 58). This feature of desert is obvious if one reflects