

# LOREN LOMASKY'S DERIVATION OF BASIC RIGHTS

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In *Persons, Rights, and the Moral Community*,<sup>1</sup> Loren Lomasky develops a general theory of basic rights and traces some of the implications of the theory for various contemporary controversies. The implications of the theory are for the most part liberal, in the classical sense of the (much abused) term. Even where not persuasive, the conclusions Lomasky draws are interesting and provocative. My interest, however, is the "derivation of basic rights" that is meant to support many of the political conclusions of the work. If Lomasky succeeds in his derivation, then this part of his work alone is a significant contribution to moral theory. I shall, then, critically examine the derivation of basic rights.

A *project* is an end that "persist[s] throughout large stretches of an individual's life and continue[s] to elicit actions that establish a pattern coherent in virtue of the ends subserved." (p.26) Projects give persons' lives a certain structure and coherence they would otherwise lack. People, Lomasky convincingly argues, are *project pursuers*.

*Reason Papers* No. 14 (Spring 1989) 86-97  
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"Project pursuit, though, is partial." (p.27) That is, projects provide their pursuers with personal *standards* of value. Such standards provide only "reasons-for-that-individual" (p.49); in the language of contemporary value theory, projects provide *agent-relative values*.<sup>2</sup> Consequently, there is conflict between agents (pp.47, 55). "Philosophical normative ethics", Lomasky believes, "is the search for rationally justifiable standards for the resolution of interpersonal conflict" (p.47). Lomasky's basic rights are the most important standard for the resolution of such conflict. Basic rights<sup>3</sup> protect project pursuers by delineating a sphere in moral space where each may act unconstrained by the demands of others.

Lomasky argues that project pursuers must value their ability to pursue projects (pp.56ff). "That means that they value having moral space." (p.60). But this does not suffice to generate basic rights. For it only follows that individuals value moral space for themselves (pp.60-61; see also p.36). The problem is clear: "how can one go beyond the bare recognition of others as project pursuers to a rational motivation to respect them *as* project pursuers?" (p.62)

The problem appears to Lomasky to be that of the celebrated Is-Ought distinction ("How can it be crossed?" [p.62]). I do not think that the problem need be so construed. If the Is-Ought problem concerns the relation between facts and values, descriptions and prescriptions, then it is unclear that this is what is at issue here. For Lomasky's problem is to show that agents who have reasons to pursue their projects also have reasons to respect one another's liberty. That is, given certain values (reasons of one sort), how is it that others (reasons of another sort) follow? The problem is an Ought-Ought, or Value-Value, one.

Lomasky proposes three "paths" to enable us to cross what he takes to be the Is-Ought divide. He is unsure which to take, adding "Perhaps some one of them can be validated, perhaps, luckily, the passage is overdetermined, or, what I suspect to be the case, perhaps the most credible account of the grounds of rational motivation involves elements of each." (p.62) Although perplexed by these remarks as to the nature or structure of the derivation, I shall attempt to outline the three arguments or parts of the "tripartite derivation of rights".

The first argument or "path" consists in noting that humans characteristically are social animals, that is, they tend to be "moved by the needs of others, especially the needs of kin" (p.62). This fact about humans does not, Lomasky rightly points out, suffice for a

derivation of basic rights; a causal (e.g., sociobiological) *explanation* of other-regarding sentiments does not provide a *justification* of these sentiments, much less a justification of rights. What it does show is that humans are *capable* of respecting the rights of others; thus "A necessary though not sufficient basis for grounding rights has been uncovered." (p.63)

I concur with Lomasky's claim that humans are characteristically moved by the needs of others. The contention is true, and I think that moral theories ought not to begin with assumptions that deny its truth.<sup>4</sup> I shall, however, make two critical remarks about the first argument or part of Lomasky's derivation. If all that is established by the altruism characteristic of humans is this necessary condition for the respect for rights, then it is unclear why Lomasky regards it as one of three possible paths to his conclusion that persons have certain basic rights. At most it establishes only one, amongst many necessary conditions for his conclusion.

More importantly, it is not clear that altruism is a necessary condition for respect for the rights of others. That depends only how we understand such respect, and this is an important matter. Lomasky notes (and I quote at length),

If it is the case that people *ought* to acknowledge and respect the rights of others, then it must be true that people generally *can* respect the rights of others. They can do so only if the recognition that others crave moral space within which to carry out their projects will somehow provide a *motivation* to cede that space. (p.63)

This will not be possible if psychological egoism<sup>5</sup> is true.

What constitutes *respect* for the rights of another? Let us distinguish between what might be called *intensional* and *extensional* respect for rights. Suppose that Albert has a right to do *x* and that Beatrice has a correlative duty to refrain from interfering with Albert's doing *x*. Suppose that Beatrice cares about Albert and so refrains *because* she so cares. Then Beatrice has respected Albert's right only *extensionally*. Suppose that she doesn't care about him, that she is indifferent or unconcerned about his interests; nonetheless she refrains from interfering with his liberty to do *x because* she believes that she is so obligated. Then Beatrice respects Albert's right both *extensionally* and *intensionally*.

If respect for rights is to be intensional as well as extensional, then the altruism characteristic of humans is not a necessary condition for respect for rights. For such altruism only motivates

agents to perform the acts required of them, *not* to perform them with certain intensions or for certain reasons. The distinction between the two different understandings of respect for rights is crucial to the question of the nature of moral obligation (and of rights), as we shall see presently.

I move now to the second argument or part of the tripartite derivation of basic rights. This "second line of approach" is complementary, Lomasky claims, to the first and is suggested by Thomas Nagel in his well-known *The Possibility of Altruism*.<sup>6</sup> The basic idea is that of the "transmission of practical reason" (pp.63ff). If Albert has a particular end which provides him with a reason to act, then Beatrice's recognition of Albert's end also provides her with (some) reason to promote Albert's end. The reason for this (as far as I can make out) is that one cannot recognize something as a reason for someone without recognizing that there *is* a reason. If Albert has a reason to do *x* and Beatrice recognizes that Albert has a reason ("understood personally") to do *x*, then there is a(n "impersonal") reason to do *x*; from this it follows that Beatrice has some reason to advance Albert's doing *x*.

I am not sure that I understand the argument fully, and I shall leave further explication of it to Eric Mack and to our discussion of his critical analysis of Lomasky's theory.<sup>7</sup> Let me simply remark that the premise that seems to be doing most of the work of this argument is an assumption of impersonal value. Thus I interpret Lomasky's second "line" to involve appeal to such value.<sup>8</sup> Critics, such as myself, who deny the existence of what is normally called agent-neutral value will consequently not be moved by the argument, until Lomasky is able to persuade us that such value exists.<sup>9</sup>

In any case Lomasky notes that the argument from impersonal value does not necessarily lead to the conclusion that he wishes to derive. For it is possible that agents not have *sufficient* reason "to accord rights to others" (p.65), although they have *some* reason to do so. At best, then, the second argument is incomplete.<sup>10</sup>

I turn now to the third argument or part of the tripartite derivation.<sup>11</sup> Lomasky asks what strategies should project pursuers adopt faced with morally unconstrained interaction with other persons? He analyzes the situation in which such agents find themselves as a Prisoners' Dilemma (*PD*). Agents might choose from amongst three possible strategies, which he labels Active Aggression, General Neglect, and Active Deference. I shall recast his argument in terms of two strategies, which I shall label *C* and *D* respectively.<sup>12</sup> The preferences of agents are the normal *PD* preferences: (*C,C*) or "universal cooperation" is ranked by each

agent above  $(D,D)$  or "universal defection", but each agent ranks "unilateral defection" in the first place. In a single-play and in a variety of repeated-play or iterated  $PD$ s, the rational strategy is  $D$  and the outcome is universal defection. But another outcome, universal cooperation, is ranked by each agent above the outcome achieved by rational action. The problem is familiar to all contemporary moral and political theorists.<sup>13</sup>

Lomasky argues that no solution is available "from a starting point of nakedly egoistic agents for whom all value whatsoever is personal" (p.69). As he argued above, humans are not egoists. I do not understand the point here. For the denial of egoism certainly does not entail the denial that all value is personal.<sup>14</sup> More importantly, the  $PD$  does *not* require that agents be egoists in the sense characterized by Lomasky. All that is required for agents to find themselves in a  $PD$  is for them to rank the various outcomes in the usual manner; whether their rankings are self-regarding or other-regarding, whether they are based on subjective or objective values, whether they presuppose agent-relative or agent-neutral standards of value is irrelevant.<sup>15</sup>

In any case, Lomasky appears to argue that the situation in which agents find themselves in the absence of basic rights is *not* that of a single-play  $PD$ . The analysis that he defends has agents repeatedly interacting. Readers may conclude that the situation is essentially that of a repeated or iterated  $PD$ . But I think that this would be an incorrect interpretation of Lomasky's analysis.<sup>16</sup> In repeated  $PD$ , agents find themselves in a series of  $PD$ . Lomasky's agents, by contrast, find themselves repeatedly interacting, albeit in situations that gradually change as they interact. What is novel about Lomasky's analysis is that he suggests that rational agents, capable of other-regarding sentiments, will empathize with those with whom they interact; further, cooperative behavior elicits increased empathy.<sup>17</sup> Thus, cooperative interactions lead agents to change their rankings of the outcomes and eventually to come to prefer cooperation to defection (or rather, to prefer cooperative outcomes to non-cooperative ones).<sup>18</sup> The result may be the "rudimentary mutual acknowledgement of moral space...[that is] the result of a natural process in which project pursuers confront each other and achieve a *modus vivendi*." (p.74).

To summarize my interpretation of the third argument: rational agents who are moved by the needs of others may find that their rankings of outcomes change as they interact with like-minded agents and that they come, by empathizing with others, to prefer cooperation ( $C$ ) to unilateral defection ( $D$ ). Repeated interactions

between such agents may, then, under certain conditions, result in the mutual acknowledgement of moral space. Lomasky's derivation of basic rights is essentially complete.<sup>19</sup>

I shall now make some critical remarks about the general derivation. First, it should be noted that Lomasky does not provide a theorem, that is, a conclusion which is derived from clearly laid out premises. Rather, what is provided is a sketch of such a theorem. This is unfortunate, because one of the virtues of theorems is that the conditions for their truth—their premises—are more easily ascertained than with argument sketches. This criticism, it should be noted, is complimentary. For if my general interpretation of Lomasky's third argument is correct, it should be possible to prove its conclusion as a theorem. This criticism is minor.

Secondly, and more importantly, it is important to understand clearly the conclusion Lomasky is entitled to by his argument. Rational agents, moved by the needs of others, interacting over time will come to respect each other's liberty and thus create a type of moral space within which each may act freely. Note that if we wish to identify this "moral space" with respect for rights, the latter can only be *extensional*. Albert and Beatrice, interacting over time, come to respect one another's rights because they come to care about one another. Their rankings of the various outcomes change with repeated (cooperative) interaction. They start in a *PD* but end up in something more akin to an Assurance game.<sup>20</sup> Such agents do *not* respect other's moral space because they believe that they are obligated to do so. They do so because their rankings of the outcomes have changed.

This is important because one might claim that moral obligation requires *intensional* rather than merely *extensional* compliance. One might claim this because one might believe that if one is genuinely morally obligated to do *x*, then one is so obligated whether or not one most prefers to do *x*. Further, one might claim that if one is obligated to do *x*, then one has a reason to do *x* which *constrains* one's preferences. Lomasky's conclusion do not allow us to say this about obligations.

I am consequently puzzled why Lomasky's agents would be interested in using the language of morals. For such agents "respect rights" only insofar as doing so is the most efficient means to their (non-egoistic) ends. At no point does the "respect for rights" that Lomasky is able to derive from his assumptions allow one to say that someone morally ought to refrain from interfering with another's liberty even when so refraining is *not* the most efficient means of realizing one's (personal and impersonal) values. Appeals

to non-moral reason suffice at every point to do what appeals to Lomasky's "obligations" do, given that the latter are never able to secure compliance with constraints that would have one refrain from pursuing one's most preferred outcomes.

The usefulness of the single-play *PD*<sup>21</sup> is that it illustrates, with unyielding clarity, the problem posed by accounts of obligation such as Lomasky's. Let us understand a *preference* to be a ranking of two outcomes: to say that outcome *x* is preferred (by someone) to *y* is to say that it is ranked (by that person) higher than *y*. Preferences can be self-interested, but they need not be, in this sense of 'preference'. Suppose that we are able to determine how two agents rank a number of outcomes (the feasible set) in terms of their ends, values, tastes, desires, sentiments, and the like, excluding only their moral principles and moral values. Let these rankings be based on objective and/or impersonal (or agent-neutral) value. Suppose that our two agents find themselves in a situation characterizeable as a single-play *PD*, given their preferences. Suppose that they realize they find themselves in such a situation. In order to achieve the cooperative outcome (where each chooses *C*), they invoke a moral device, promising. They promise to one another to choose *C*. Promises create obligations. Let us understand the obligations created by promises to bind promisors to do something, whether or not so acting best satisfies their non-moral preferences as characterized above. Agents capable of so acting will be able to cooperate in single-play *PDs*. Lomasky's agents will not. I would claim that this shows that Lomasky's agents do not have available to them the resources of moral obligation.<sup>22</sup>

Thirdly, it would appear that the account of agents as project pursuers does not play an essential role in the derivation of basic rights. (This makes me unsure of my interpretation of the argument.) The assumptions that appear to be doing the important work are (1) the claim that humans are not purely self-interested and (2) the claim that people come to take an interest in the interests of those with whom they interact, especially if the latter are cooperative. Both of these assumptions seem to be true. And they are what make Lomasky's argument original. However, if the conclusion about respect for rights follows, it would seem to do so independently of the assumption that agents are project pursuers. The assumption is used to establish partiality (p.27) and presumably conflict (p.47). But presumably many other features of agents establish this. Further, the fact that people pursue projects does not entail that the only values that move them are those provided by their projects. Thus an understanding of the projects of agents

might be insufficient to determine how agents will or should act in situations such as the *PDs* above.<sup>23</sup>

The account of agents as project pursuers might, however, be used to address the problem of compliance discussed above. Project pursuers are agents capable of acting according to plans and thus, we may presume, of acting counter to their occurrent preferences. Now the alleged irrationality of counter-preferential choice is what leads agents to defect in (most) Prisoners' Dilemmas, as those agents are usually characterized. Lomasky's project pursuers, however, have available to them the means to commit themselves to conditional cooperation (choose *C* whenever you believe others are so disposed); they can act counter-preferentially when so acting accords with their plans (and intentions). Lomasky thus has in his account of agents the resources to address and possibly to resolve the problem of compliance discussed above.<sup>24</sup>

Fourthly, we should note that the respect for rights that Lomasky derives at most provides reasons to respect the moral space of those with whom one "interacts". Reasons to respect the rights of others depends on the development of the requisite other-regarding sentiments. Presumably this depends on proximate interaction. If that is so, then agents who do not interact proximately—e.g., most market interactions?—do not have a reason to respect the rights of others.

Lastly, I have concentrated on Lomasky's derivation of basic rights in part because I view it as the foundation of the conclusions he draws about various moral and political controversies. But I may be mistaken about this. For he may be a coherence theorist, appearances to the contrary. In the last chapter he claims that "Moral theories are tested in the first instance by how well they fit and systematically account for strongly held pretheoretical intuitions." (p.196) If this is the case, we must ask about Lomasky's theory, as we must about Rawls', what then is the purpose of the derivation?<sup>25</sup>

The text of remarks made at the American Association for the Philosophical Study of Society Symposium on *Persons, Rights, and the Moral Community*, held at the meetings of the American Philosophical Association, Washington, D.C., December 28, 1988.

1. (New York: Oxford University Press, 1987). All parenthetical references are to this work.

2. *Impersonal value* presumably is *agent-neutral value*, that is, value from any perspective. I am not completely confident in my understanding of Lomasky's notions of personal and impersonal value. For in the last chapter, he argues that personal value presupposes impersonal value (pp.233ff); the text there suggests that impersonal value is (merely?)

*inherent or agent-independent value*. I suspect that perspective (agent-relativity vs. agent-neutrality) and independence of subjective ends (inherent vs. "subjective") are being conflated. Insofar as this is possible, I leave these issues to Eric Mack's discussion.

3. The set of *moral* rights is a proper subset of that of *basic* rights (pp.101ff). We may, however, suppose that the latter are moral rights in the sense that they are rights granted by morality. Lomasky's unusual terminology may mislead.

4. I argue elsewhere that contractarian theories of justice should not assume that people are self-interested. If, despite appearances, Lomasky's theory is not contractarian, my arguments nonetheless supplement his contention. See "The Relation between Self-Interest and Justice in Contractarian Ethics", *Social Philosophy & Policy* 5, 2 (Spring 1988): 119-153.

5. Lomasky characterizes psychological egoism as the thesis that "nothing can possibly move a person to action except desires for his own personal well-being" (p.63).

6. (Oxford: Clarendon Press, 1970).

7. I might note that I find it somewhat odd to invoke an argument made almost two decades ago by Nagel when the consensus in the field has been for some time that the argument fails and when Nagel himself no longer appears to endorse it. Had Lomasky clearly set out and defended Nagel's position, the matter would be different.

8. This conjecture is supported by Lomasky's claim at the end of the "tripartite derivation" that "it has been claimed that moral space will be fenced off through individual's [sic] exercise of a practical reason that recognizes both personal and impersonal value" (p.74).

9. On these matters I am in agreement with Eric Mack. It is important to understand that one may deny that there are agent-neutral values without denying that (some) values are inherent (or agent-independent). Further, one can deny that values are agent-neutral as well as inherent without denying that value-judgments are objective, that is, judgments whose truth-values can be ascertained.

10. I make this point in an unpublished essay, "Agent-Relative Value, a Problem with Justice, and Contractarian Ethics".

11. An interpretative problem is created by the text's not clearly indicating the beginning of the presentation of the third argument. I take it that one of the paragraphs in the second half of p.65 introduces the third argument, although I am not certain. I hope that my understanding of the argument is not affected by this problem.

12. I do this in part because I am not sure that Lomasky's three strategies are logically exhaustive, as they must be for the sort of game-theoretical conclusions that he wishes to draw. I do not believe that my recasting of his argument adversely affects its cogency.

13. The matrix for a  $2 \times 2$  Prisoners' Dilemma is as follows:

|        |   |          |      |
|--------|---|----------|------|
|        |   | Beatrice |      |
|        |   | C        | D    |
| Albert | C | 2, 2     | 4, 1 |
|        | D | 1, 4     | 3, 3 |

(where  $1 > 2 > 3 > 4$ ). The problem is that although the (C,C) outcome Pareto-dominates (D,D), the former is not stable.

14. My suspicion that several distinction have been collapsed is reinforced by the discussion on pp.69-70.

15. Suppose that Albert and Beatrice each confront the choice of helping him- or herself (C) or of helping the other (D). And suppose that, although each most cares about the other, each is better off if both help only him- or herself; their preferences over outcomes are then the following:

- |        |          |
|--------|----------|
| Albert | Beatrice |
| (D,C)  | (C,D)    |
| (C,C)  | (C,C)    |
| (D,D)  | (D,D)    |
| (C,D)  | (D,C)    |

Then Albert and Beatrice find themselves in a standard Prisoners' Dilemma, although their preferences are *not* self-interested.

16. This is just as well. Contrary to what philosophers often think, it is *not* the case that universal cooperation is to be expected in repeated PDs. In his celebrated *The Evolution of Cooperation* (New York: Basic Books, 1984), Robert Axelrod shows only that there are cooperative equilibria in PDs where agents interact in pairs, results that are not generalizable to n-person interactions. The conditions under which Michael Taylor demonstrates the possibility of cooperation are restrictive; see his *The Possibility of Cooperation* (Cambridge: Cambridge University Press, 1987). For a recent theorem that there are *no* cooperative equilibria in finitely, but indefinitely, iterated PDs, see John W. Carroll, "Indefinite Terminating Points and the Iterated Prisoner's Dilemma", *Theory & Decision* 22 (1987): 247-256, and "Iterated N-Player Prisoner's Dilemma Games", *Philosophical Studies* 53 (1988): 411-415.

17. Edward McClennen, in "Justice and the Problem of Stability," in *Philosophy & Public Affairs* 18 (Winter 1989): 3-30, argues in a similar manner for Rawls' difference principle.

18. A game-theoretic situation (e.g., a PD) is determined by the structure of the agents' preferences. If the preference ordering change, the situation changes.

19. The actual presentation of the argument in the book is in two stages: a two-person version is first developed, followed by a generalization to n-persons. My neglect of the distinction of the two stages should not lead readers to underestimate the difficulty of generalizing from the two-person to the n-person case. I believe that Lomasky's generalization will fail

because of the problem posed by coalitions (p.77), but the argument is insufficiently formal to be able to argue this here.

20. A two-person Assurance Game is represented in the  $2 \times 2$  matrix below:

|        |   |          |      |
|--------|---|----------|------|
|        |   | Beatrice |      |
|        |   | C        | D    |
| Albert | C | 1, 1     | 4, 2 |
|        | D | 2, 4     | 3, 3 |

(where  $1 > 2 > 3 > 4$ ).

21. Or of a variety of repeated-play *PDs*, such as finite series of *PDs*, where the agents know when the series terminates.

22. The criticism here is very similar to that commonly made of Hobbes, that he lacks an account of moral obligation. It should be emphasized that this criticism in no way depends on construing moral obligations as categorical imperatives in Kant's sense.

In response to this criticisms it is often said that cooperation in one-play *PDs* is uninteresting as we never or rarely find ourselves in such. This response has always struck me as inadequate. For one, it may be that we rarely find ourselves in one-play *PDs* simply because we do whatever we can to avoid them, and we might do this because we in fact are agents that find it rational to choose *D* whenever *D* is the dominant act (or strategy). Secondly, *D* is the dominant act (or strategy) in a variety of iterated *PDs*; if Carroll's theorem (see note 14) is significant, then it is only in infinite iterated *PDs* that cooperative equilibria can be expected. Surely the problem posed by *PDs* cannot be so easily dismissed.

23. It must be that this account of agents is to determine either the form (basic rights) or the content (certain rights) of the "moral space" that is defended by Lomasky. I would not think it necessary for this purpose; James Buchanan and David Gauthier each defend rights theories without appealing to such a view of agents. See Buchanan's *Limits of Liberty* (Chicago: University of Chicago Press, 1975) and Gauthier's *Morals by Agreement* (Oxford: Clarendon Press, 1986).

I might note that references to the *Limits of Liberty* are not to be found in Lomasky's book, which is surprising given how similar the theories are in so many respects. *Morals by Agreement* is reviewed by Lomasky in *Critical Review* 2 (Spring/Summer 1988): 36-49. Lomasky is skeptical about Gauthier's theory, as he believes that "Gauthier's understanding of *rationality* and *morality* are both too straitened to explicate adequately what it is for someone to be a rational, moral person." This criticism of Gauthier is ironic give my similar criticism of Lomasky (which Gauthier would probably endorse).

24. These resources are also present in Gauthier's revisionist account of practical rationality as "constrained maximization". Lomasky appears to be misled as to the nature of Gauthier's theory by focusing on the latter's

assumptions of self-interest and of subjective value, neither of which are necessary or sufficient for his revisionist account of rationality.

25. I am especially puzzled by this matter, as I am by a related query: why isn't Lomasky's theory *contractarian*? It clearly is not a natural rights theory, if by that one means a theory which asserts that persons have certain basic rights *by virtue* of their possession of certain natural attributes (e.g., rationality), independently of and prior to convention. Lomasky's derivation appears to be an attempt to generate rights from non-moral, albeit normative, premises. The assumptions of other-regarding sentiments or of impersonal value do not make the theory non-contractarian, unless the impersonal value includes moral value (in which case the assumption, unless defended, is question-begging). I fail to see how the theory is not contractarian in the manner in which Hume's account of justice and property, Buchanan's account of law, and Gilbert Harman's general moral theory are contractarian. (For the latter see "Relativistic Ethics: Morality as Politics", in Peter A. French et al., eds., *Midwest Studies in Philosophy*, Vol. 3, [Morris, MN: University of Minnesota, 1978], pp.109-121. Regarding Hume, see David Gauthier, "David Hume, Contractarian", *Philosophical Review* 88 [1979]: 3-38.) But this controversy is a matter for another time.