

AGAINST LOMASKYAN WELFARE RIGHTS

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“Once you give up integrity, the rest is a piece of cake.”
J.R. Ewing, *Dallas*

In this brief discussion I wish to examine Loren Lomasky's defense of the following claim, advanced in his *Persons, Rights, and the Moral Community*¹:

If a person is otherwise unable to secure that which is necessary for his ability to live as a project pursuer, then he has a rightful claim to provision by others who have a surplus beyond what they require to live as project pursuers. In that strictly limited but crucial respect, basic rights extend beyond liberty rights to welfare rights.[p.126]²

Lomasky states that the “thoroughgoing libertarian who regards all restrictions of liberty as impermissible whatever the grounds on which restriction is based will reject the claim that there

*Held at the December 1988 meeting of the American Association for the Philosophic Study of Society, Washington, D.C.

are any welfare rights." And he adds, "Such a libertarianism is indefensible."(p.127)

Aside from the fact that I take the rights that would be violated by the exercise and enforcement of welfare rights inviolable, at least as legal principles of a just society, and thus reject Lomasky's view on those grounds, I confess, also, that I have been defending the libertarianism he claims is indefensible. Thus I have something of a professional stake in this issue apart from the more important stake I have in it as a person and citizen. So I will try to show that Lomasky is wrong, at least if he believes that welfare rights ought to be legally protected.

I want first of all to clear up a point. A thoroughgoing libertarian might not regard "all restrictions of liberty as impermissible whatever the grounds on which restriction is based." It is possible that within the sphere of personal conduct a libertarian will reject such restrictions, just in the kind of cases Lomasky has in mind. I have myself argued just that view in my paper, "Prima Facie versus Natural (human) Rights"³. I believe that Eric Mack argues a somewhat similar thesis in his papers, "Egoism and Rights"⁴ and "Egoism and Rights Revisited"⁵. I believe both of us made a worthy effort to dispel Lomasky's somewhat cavalier claim that our type of libertarianism is indefensible—they deserve at least a look-see before the claim is advanced with the kind of confidence Lomasky demonstrates.

Some libertarians, such as Murray Rothbard, do indeed take it that basic natural negative or, in Lomasky's terms, freedom rights imply that under no circumstances is it permissible to violate or disregard them. My view is that under no circumstances is it permissible for a just government—i.e., that of a free society—to violate such basic natural negative rights. But for individuals these rights may at times have to be disregarded.

Which is the position Lomasky claims is indefensible? I assume that since he is defending welfare rights and since rights are what a just government is established to protect, he would hold that government may protect welfare rights. This would imply clearly enough that Lomasky not only defends the occasional violation or disregarding of such rights but their violation by the government.

Let us now see what Lomasky has to say in defense of his soft libertarianism or restricted welfare statism. He argues that the strong libertarianism he finds indefensible "disconnects the theory of basic rights from its foundation in a theory of practical reason for project pursuers."(p.127) He goes on with his argument:

Individuals have reason to value the maintenance of a regime of rights because they value their own ability to pursue

projects. Should that ability be placed in jeopardy by a system of rights such that one can either continue to respect others' rights or be able to pursue projects but not both, then one would no longer have a rational stake in the moral community established by that system of rights....[p.127]

From this it seems to me what may follow is just the thesis Mack and I defend. In other words, from what Lomasky says it is permissible on occasions to disregard the rights of persons. But it does not follow from this that administrators of the legal system ought to do so. The police, the courts, the legislatures, etc., have no reason to grant welfare rights. Yet this does not imply that persons always act in such a way that rights are decisive in what they will do.

Here is why the extension of the occasional permissibility of the private disregard for rights to public policy is wrong. First, just government has as its function to uphold (protect, maintain, promote) broad principles of community life, not the exceptional or emergency policies that may befall certain individuals. Second, the rights individuals have cannot be in an irreconcilable conflict with each other—because (a) rights claims are truth claims and truth claims must be consistent with each other, given reality's character of not admitting contradictions or inconsistent state of affairs or principles, and (b) to act under the guidance of general political principles would not be possible if one set of them contradicted another set—i.e., liberty rights vs. welfare rights. (I take it that it is clear that if *A* has the liberty right to build and keep a fortune through his or her honest effort and succeeds, then the protection of this right is in practical conflict with protecting *B*'s welfare right to some of this fortune.)

Let me now suggest why Lomasky falls prey to the theory of welfare rights. He does so, I believe, because it is indeed true that sometime—as he puts it, “in cases of extreme exigency”—one may steal from others. But this does not show that one has a right to (some, even if ever so little of) the property of others. Rights are precisely general political principles, not principles guiding bits of rare actions individuals might have to take.

Admittedly—and this is where I think Rothbard is mistaken—not all normative principles are equal. Some are fundamental, some are virtually universal, while some may be rather specifically applicable. A principle of human conduct as such is going to be more fundamental than a principle of human political conduct. And while the agency established and committed to upholding the latter ought to take those principles as absolute within the context of politics, people in general need not do so, especially when they find them-

selves outside situations where, according to Locke (as quoted by H.L.A. Hart) "peace is possible."

To put this another way, there are varied dimensions of human life—personal, political, familial, fraternal, professional, etc.—and the principles bearing on the narrower dimensions do not properly apply to the broader ones. The dictates of personal morality—e.g., Aristotle's dictum of right reason or Rand's principle of rationality—apply most broadly, universally. So when appropriate by rational standards, it would be wrong to adhere to a subsidiary principle instead. So when in one's personal life one is facing the exclusive choice of either to invite death or to steal, one ought to steal. But this does not show that such a judgment should now become a principle within the narrower dimension of politics, to be enforced by political leaders.

One might model my argument on the familiar notion that hard cases make bad law. Yet this does not show that even within the operations of the legal system no notice may be taken of the applicability of the unusual and rare edict to steal. When the Donner Party engaged in cannibalism, because of the rare case it would have made perfectly good sense for a judge to use judicial discretion and pardon the culprits once they have been convicted of the crime they committed. Similarly, someone who steals in a condition of dire need, while subject to prosecution should not be allowed to linger in jail as a common thief should be.

The reason Lomasky thinks that there are welfare rights is that he takes it as unjustifiable to expect someone whose "ability [to pursue projects is] placed in jeopardy by a system of rights such that one can either continue to respect others' rights or be able to pursue projects but not both...[to] have a rational stake in the moral community established by that system of rights....[p.127] "He goes on: "If acknowledgment of rights is rationally motivated by concern for one's future as a project pursuer, it will be plainly irrational to pledge support to a regime in which one's prospects for project pursuit are extinguished"(p.127).

But all this can be granted without it being the case that persons have rights to welfare. In short, nothing about the exceptional cases demonstrates the existence of welfare rights. All it shows is that those who are in such dire straits have reason to disregard rights.

Lomasky however goes on to claim that "State establishment of a welfare apparatus is not inconsistent with, and may be required by, the maintenance of a liberal order. Public institutions may rightfully direct the transfer of resources among citizens. It follows by similar reasoning that there can be a limited place within the

law for 'Good Samaritan' (or, perhaps better, 'Minimally Decent Samaritan') legislation" (p.128). This follows from the above argument for welfare rights, since rights are just what governments are supposed to protect.

Now if my rejoinder is sound and all that Lomasky has shown is that there are emergency case that support some persons' disregard for rights, the welfare statist conclusion just does not follow. One needs to show that these exceptional cases create rights to services.

Of course, from a social contractarian position on rights, there may be reason to think that Lomasky has a point. If rights are mere strategic vehicles to get what one wants, then if a certain type of right won't do this trick, some other type will have to be introduced. So he is right from within such a contractarian viewpoint that what individuals require "is primarily liberty, but that fact does not rule out the need for a safety net that captures extreme cases"(p.128). A similar conclusion would seem to me to follow from a utilitarian theory of rights—see, for example, Russell Hardin's position in his "The Utilitarian Logic of Liberalism."⁶

But are rights grounded on social contract alone? Well, one might think so from reading the bulk of Lomasky's book. Yet at the end he does maintain that even though "the fact of commitment itself creates personal value,...such personal value rests on a foundation of preexistent impersonal value" (p.241). So Lomasky says "a rational agent is not merely someone good at getting what he wants; he is someone who wants what is good to get" (p.241). It seems to me, then, that there is more to Lomasky's view than even a strong contractarianism that rests merely on commitment. There is, behind the commitment, objective value that is worth being committed to.

But once we begin with objective value, we must also do justice to certain ontological or metaphysical principles—e.g., the law of non-contradiction. Thus it seems to me that even from his own framework Lomasky cannot tolerate that his instrumentally conceived basic rights come into fundamental conflict with one another. Yet welfare rights and liberty rights do just that. If I have the liberty right to pursue my projects, based on the objective value of pursuing some projects that I ought to commit myself to pursue, then someone else could not also have the welfare right to violate my liberty right. And welfare rights would easily enough violate liberty rights.

Consider that a person in dire need for medical care has a welfare right to such care from those who can provide it. Another person is a doctor who has the skills to provide the medical care but has a serious project he is pursuing at the time which he also has the liberty right to pursue. One or the other right must give. To put

it more harshly, both rights cannot exist.

If it were all just a matter of social contract, the contract could be renegotiated for purposes of this particular situation and no conflict would be generated. But if the rights in question rest on something more basic than mere contract or convention, I see no way that this option could arise.

Perhaps, then, we ought to give up the natural rights approach in favor of the exclusively contractarian one. No value base is possible, since the moral-political problems we need to solve are insoluble. Since ought implies can, it follows that it could not be the case that a theory of rights issuing in the basic conflict sketched above rests on objective values.

But this move would be premature. As I noted at the outset, a natural rights approach does have adequate solutions for the moral problems that arise. Of course, it does not guarantee that such solutions will in fact be reached by the persons involved. But all we need is that the solution could be reached.

And it seems to me that the solution to the problem of emergency cases can be reached without any resort to welfare rights. We can consider the situation from the point of view that is advanced in some earlier libertarian work, work that seems to me to merit reconsideration before one accepts the seeming impasse I think we find in Lomasky's theory.

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

2. James Sterba advances a very similar argument to show why natural rights libertarianism implies the full blown welfare state. See, Douglas B. Rasmussen and James Sterba, *The Catholic Bishops and the Economy* (Transaction Books, 1986). I discuss Sterba's argument at some length in my *Individuals and Their Rights* (Open Court Publishing Co., 1989).

3. *Journal of Value Inquiry*, Vol. 10 (1976).

4. *The Personalist*, Vol. 54 (1973).

5. *The Personalist*, Vol. 58 (1977).

6. *Ethics*, Vol. 97 (1986).