

# ON THE INCOHERENCE OF POSITED RIGHTS

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## INTRODUCTION

Rights are generally construed in either one of two forms: negative or positive. Negative rights ensure non-interference, whereas positive rights seek to guarantee certain provisions (commonly what is deemed to be minimal provisions for basic sustenance). I argue that negative rights, if properly construed, ought to prevail because negative rights are the only rights that do not violate moral side-constraints or lead to theoretical inconsistencies. Conversely, I argue that positive rights not only violate moral side-constraints, but that their justifications yield a contradiction.

I will first clarify what rights, in general, are, and then clarify how negative rights must be conceived in order for them to be logically consistent. I will then assess positive rights, demonstrating how positive rights violate moral side-constraints, and how the most common justification for positive rights is incoherent. It is thus concluded that positive rights cannot be maintained consistently within a principled framework.

## RIGHTS AS ENTITLEMENTS

Rights of either modality reflect entitlements. Although positive rights are more frequently referred to as “entitlements,” negative rights also depend on some notion of entitlement. Positive rights propose that individuals are entitled to certain provisions such as healthcare, minimum income, housing and so forth. Negative rights, on the other hand, do not assert any such entitlement for external provisions, but are, as I will argue, *the effect* of the claim that individuals exist as moral agents who own themselves.

Rights imply absolute rules. To say, for instance, that one has a right to one’s body means that one enjoys *absolute* entitlement to one’s own body. To say that A has a right not to be killed implies absolutely and under no circumstances is it permissible for another to kill A. Rights are rigid; they are not heuristics. A right not to be enslaved is coherent if and only if the enslavement of persons is always and everywhere prohibited. Rights cannot be respected in one instance and then permissibly violated in another. If they are, then they are not *rights*. Rights, as such, enjoy a special position in moral and political philosophical discourse. Rights are grounds for enforcement, such that a violation of an individual’s rights warrants the legitimate use of force—justice.

## PROPERLY CONSTRUING NEGATIVE RIGHTS

The discussion of negative rights is often misunderstood, even within academic circles. For instance, negative rights, originating from the Lockean tradition, assert three primary negative rights: the right to life; the right to liberty; and in propertarian theories, the right to one's property. These are held to be rights of non-interference, such that the enjoyment of these rights does not interfere with other individuals' rights. However, the "negative" in "negative rights" is routinely mischaracterized and given only perfunctory consideration. I propose that the "negative" in "negative rights" refers to the nature of negative rights as coming *via negativa*.

Negative rights lead to rights conflicts if they are *asserted*. Although they are generally construed as being coherent because they do not lay claim to other individuals in any explicit sense, the reality is that if negative rights are asserted—as is often the case in Lockean readings—they cannot reliably be simultaneously enjoyed. This misunderstanding is best illuminated by Justice Oliver Wendell Holmes, Jr.'s famous expression: "Your right to swing your arms ends just where the other man's nose begins."

The "right to swing your arms," in Holmes' words, reflects the assertion of the *prima facie* negative right to liberty. Although largely without objection on the surface, if taken to its logical conclusion, the *assertion* of the negative right to liberty leads to a subtle and unavoidable point of incoherence. If one is entitled to liberty (i.e., it is a right), then this right is absolute without exception. However, one cannot enjoy one's right to liberty without exception if it is limited by others (be it their nose or otherwise). A common response is to defend negative rights on the basis that others cannot equally enjoy their negative right to liberty if one's exertion of liberty (here, swinging one's arms) interferes with another's enjoyment of the same right. If this is maintained, however, then neither party truly has a right to liberty, since both rights to liberty are limited and curtailed by others and cannot be enjoyed without exception. The solution, then, is to correctly analyze "negative rights," such that no apparent contradiction occurs as a result of a misuse of language.

The proper analysis of negative rights, then, is to pursue the matter *via negativa*. Concisely, negative rights are not asserted or posited. If they are asserted, they are merely positive rights that masquerade as negative rights. To avoid this problem, one can rely on the principle of self-ownership, which I will argue follows from the two ensuing elements.

Although a deep philosophical matter unto itself, self-ownership consists of two parts that cannot be dealt with fully here: (i) the ontological component, (ii) the moral component. Within the liberal humanist tradition, the ontological concept of the individual (or “person” in ordinary language) is generally accepted. However, point (ii) is more contentious. To establish that individuals’ bodies (which are affirmed ontologically) ought not be interfered with requires a moral thesis. This generally takes the form of deontological rules, in the sense best expressed by Robert Nozick’s discussion of moral side-constraints. Without in-depth discussion in the present exposition, it will suffice for now to say that some moral principle (N) prohibits certain actions involving other individuals’ bodies, such that N is a moral side-constraint.<sup>1</sup>

If the conjunction of the ontological reality of persons and N is affirmed (which produces self-ownership), then negative rights follow *via negativa*. That is, negative rights (such as the right to life or liberty) are not actively posited, yet their substance is nevertheless obtained. If individuals exist (ontologically) and there is some deontological rule (N) that enjoins certain actions (such as rape, murder, assault, the common denominator of which is the initiation of force), then individuals *in effect* and *implicitly* have rights to life, liberty and, arguably, property. This will be the case whether or not the rights to life, liberty and property are explicitly asserted (i.e., they are established not by asserting what the rights are, but by establishing what actions are morally impermissible: viz., *via negativa*). In sum, affirming a right to life and subsequently a right to liberty will lead to rights conflicts between liberty and life. This can be eschewed by not positing negative rights, and instead achieving the substance of negative rights through (i) and (ii). Indeed, it is necessary to differentiate negative rights from positive rights and positive rights that merely look like negative rights (i.e., *posited-negative* rights like life, liberty and property). The aim is to avoid rights conflicts—which inevitably result from any form of posited rights—since rights conflicts require a resolving theory to determine rights priority in a given case. However, a priority structure among conflicting rights invariably appeals to consequences,<sup>2</sup> and as such are rights no longer.

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<sup>1</sup>I maintain that a sufficient principle, for these purposes, is a corollary to John Stuart Mill’s harm principle: the non-aggression principle (NAP). The NAP may be justified deontologically, as I argue elsewhere. In brief, the initiation of force, or aggression, can be shown to violate a perfect duty. The non-aggression principle, then, serves as a moral side-constraint in Nozickian terms.

<sup>2</sup>This can be compared with the notion of a “utilitarianism of rights,” as is explored by Robert Nozick in *Anarchy, State, and Utopia*.

## POSITIVE RIGHTS

If posited-negative rights lead to rights conflicts and theoretical inconsistencies, it is easy to foresee the theoretical problems attending to an explicitly positive rights view. Restated, positive rights are entitlements to certain things such as housing or other forms of basic human welfare. A right of this kind, for instance, is expressed in the United Nations' Universal Declaration of Human Rights, promulgated as a "right to an adequate standard of living" (Article 25). Presumably well intentioned, such positive rights nevertheless overlook the fact that housing, or any product(s) requisite for minimum welfare, can only be obtained through human labor and effort.

If one has a right to housing, then one has a right to other individuals' labor. Since rights must be respected absolutely, and rights provide grounds for the use of violent force if disrespected, then individuals who do not construct housing units for others can be punished with physical force (or forced to construct housing for others, or forced to fund the construction of these houses if there are builders). In the strongest formulations, even if an individual (L) does nothing at all and is simply idle, a right to housing or welfare would force L into some kind of labor. Conflicts, which negative rights theories purportedly avoid, arise when individuals make claims on other individuals. The nature of this conflict becomes clearer upon closer examination.

Positive rights are not arbitrarily asserted, and the range of positive rights is generally limited to certain basic provisions. In this regard, the most common justification for positive rights exists as a criticism of negative rights. Proponents of positive rights, for instance, argue that negative rights, such as the right to life, are merely formal and unsubstantive in the absence of accompanying positive rights<sup>3</sup> Essentially, without adequate welfare, the notion of a "right to life" is nothing but an empty slogan. Positive rights, then, are justified instrumentally as means toward greater negative rights (such as the right to life). This justification for positive rights, however, yields a contradiction. I label this the "means argument."

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<sup>3</sup>For instance, Frances Fox Piven has expressed such views, characterizing the notion of equal opportunity (negative rights) without positive entitlements as a mere mockery (see Piven's engagements in Milton Friedman's documentary series *Free to Choose*). I have also witnessed this view expressed by Stanford professor Debra Satz in a 2013 debate at McGill University.

## THE MEANS ARGUMENT

Suppose some negative right  $X$  (let us take it to be Locke's negative right to life). Proponents of positive rights argue that in order for  $X$  to be substantive,  $X$  must be accompanied by certain prerequisites, such as basic levels of subsistence. Without basic levels of subsistence,  $X$  is not obtained in any meaningful sense. The means argument, then, proposes some positive right  $\phi$  (here, the right to basic welfare), such that  $\phi$  is a sufficient condition for  $X$ .<sup>4</sup> The means argument suggests, formally, that  $\phi \rightarrow X$ . However, this justification is untenable. Under positive rights, individuals have claims on each other, and these claims are claims on other people's labor. In order for  $\phi$  to obtain, then,  $\phi$  must make a claim on other individuals' labor. Since rights are enforced, individuals are forced to respect  $\phi$  (provide minimum subsistence for others). The enforcement of  $\phi$  thus necessitates a threat against individuals' lives. (E.g., L's life is at stake when L is forced to provide for others in order to comply with their basic subsistence rights.) Critically, however, since our positive right is justified *precisely as a means* to the negative right to life, we obtain a situation in which  $\phi$  implies something contrary to an individual's right to life, while simultaneously being justified precisely because it enables an individual's negative right to life (the means argument). The means contradicts its end.

Formally, we are left with the following situation:

1	$\phi \rightarrow X$	
2	$\phi \rightarrow \neg X$	
3	$\phi$	
4	$X$	$\rightarrow E, 1, 3$
5	$\neg X$	$\rightarrow E, 2, 3$
6	$X \wedge \neg X$	$\wedge I, 4, 5$
7	$\perp$	$\perp I, 6$
8	$\neg \phi$	$\neg I, 3-7$

When we suppose a positive right  $\phi$  (line 3), we see that it entails a contradiction (line 7). As such, one can infer not- $\phi$ , or that  $\phi$  is false and

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<sup>4</sup>The positive right itself is a sufficient condition for  $X$  but not a necessary condition for  $X$ . The necessary condition for  $X$  is subsistence; the positive right merely ensures this basic subsistence. However, as for this particular justification of positive rights, I do not focus on other sufficient conditions for  $X$  because they are not rights related.

thus incoherent as a rule. The most critical, and presumably contentious, line of the argument is line 2, which argues that  $\phi$  actually brings about a situation that is contrary to a right to life. Line 2 can be justified by proving the implication from  $\phi$  to  $\neg X$  in a larger derivation. This can be achieved by demonstrating that  $\phi$  implies F (F being a threat or use of force), and that F is contrary to an individual's right to life, generating  $\neg X$ . That is,  $\phi \rightarrow F \rightarrow \neg X$ , where  $\phi \rightarrow \neg X$  is proven by transitivity. The justification for our positive right, then, remains incoherent.

It was argued earlier, however, that posited-negative rights are misguided (a negative right to life, such as X). Positive rights, then, should be more appropriately pitted against the principle of self-ownership, which has been rendered in its place. Simply, because positive rights lay a claim to an individual's labor (enforceable by physical violence) or impel individuals to labor, this contradicts the notion that individuals own their bodies (since in order to forcibly extract labor from an individual requires that they be physically coerced). In particular, extracting labor by force violates N, which enjoins the initiation of force against individuals (i.e., taken together with the ontological reality of individuals, we achieve the principle of self-ownership, and thus a violation of self-ownership, or simply the idea that individuals are the owners of their bodies and the uses thereof). A possible objection, of course, would be that the use of force is legitimated as a matter of justice (punishment for violating an individual's right to subsistence). However, the right to subsistence cannot be dogmatically or arbitrarily asserted. On this, I have shown that the most common non-arbitrary justification for positive rights yields a contradiction.

## CONCLUDING REMARKS

If rights are not arbitrary, and positive rights are rights, then they must be justified. The justification for positive rights relies on greater negative rights, but any such justificatory scheme leads to a situation in which the positive right, as a means, contradicts its ends. It is inevitable that positive rights, which are claims to the provision of certain goods and services, are claims to other individuals' labor, since these goods and services can only come into being through human effort. If an individual's labor is connected with the use of her body, then the forcible extraction of labor from an individual is an indirect claim on that person's body. As such, the forcible extraction of labor is an initiation of force against a person. If the initiation of force is prohibited by a moral side-constraint, then positive rights are fundamentally immoral.

Negative rights, properly construed, must prevail over positive rights. Although the aims of positive rights certainly reflect virtues, positive rights cannot be justified as rules or in a principled manner. The aims of positive rights are likely justifiable on utilitarian grounds, but in such cases they are no longer rights proper; they are *ad hoc* consequentialist judgments. Nevertheless, the provision of basic human welfare enjoys strong support from all three major schools of moral thought. There is a persuasive utilitarian case for charity, as there is a compelling Virtue Ethical case and Kantian case through imperfect duties. But these justifications demand something different than rights, and such noble goals can only be accomplished in a morally and logically consistent manner through uncoerced beneficence.