

NOZICK ON PROPERTY RIGHTS: TO EACH ACCORDING TO MARGINAL PRODUCTIVITY

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According to Robert Nozick,¹ property distribution in a free market system is just. Since their holdings are "roughly their marginal products," people in a free market system have a right to their marginal products. Under Nozick's theory, justice is entitlement. An examination of the claim that persons in a free market system have a right to their marginal products is an examination of the entitlement conception of justice in holdings. This Article will consider whether individuals in a free market system, which Nozick favors, are justified in their holdings. The first part will seek a simplified version of the entitlement principles that stresses the importance of free choice in those principles. The remaining section will then test entitlement in the context of a free market system.

ENTITLEMENT PRINCIPLES

In support of a minimal state, Robert Nozick offers an entitlement theory of justice in holdings composed of three principles: the principle of acquisition, the principle of transfer, and the principle of rectification for violations of the first two principles. Together these principles stipulate that an individual *A* has a right to property *P* if and only if the following disjunction is true:

(i) *A* acquired *P* justly or *A* received *P* through a just transfer or *A* received *P* through a just rectification.

Furthermore, if (i) is true, then so is:

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1. R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

(ii) No one other than *A* has a right to *P*.

I wish to raise three questions concerning Nozick's account of *A*'s right to *P*.² Initially, if *A*'s having *P* meets Nozick's three principles, is *A* entitled to *P*? Secondly, if *A* is entitled to *P*, does *A* have a right to *P*? Finally, if *A* has a right to *P*, does *A* have the exclusive right to *P*? Nozick answers "yes" to all three of these questions. I will answer a qualified "yes" to the first question and "no" to the last two questions. That is, I shall argue that if *A*'s having *P* meets the three principles of entitlement, *A* may be entitled to *P*, but it does not necessarily follow that *A* has a right to *P*. Further, even if *A*'s entitlement to *P* does establish a right to *P*, it does not necessarily follow that *A* has the sole right to *P*.

Consistently with Nozick's explanation of them, the three principles of entitlement may be written in the following manner:

A has a right (is entitled) to *P* if and only if:

- (i) *A* has appropriated *P* by mixing labor with *X* to produce *P* without violating the Lockean rights of anyone else,³ or
- (ii) *A* has received *P* by a process of transfer (gift or productive exchange) without violating anyone's Lockean rights, or
- (iii) *A* has received *P* by a process of rectification that does not violate anyone's Lockean rights.

If one has a right to the ownership of an oil well, one must have acquired it justly, for example, by finding and making it productive, or by receiving it through a gift or voluntary and productive exchange, such as inheritance or purchase.⁴ As a way to focus on the substance of these requirements for justice, Nozick summarizes them in an admittedly oversimplified maxim: "*From each as they choose, to each as they are chosen.*"⁵ This maxim nonetheless stresses a central tenet

2. *See id.* at 151-53. While Nozick claims that this is only the outline of a theory, a good deal of his argument against alternative theories such as those of Rawls and Marx rests on their violating the entitlement principles. Examination of those principles as an account of property rights (or rights to holdings in Nozick's terminology) is therefore an appropriate response to his work.

3. *Id.* at 151, 174-75. Notice that in Nozick's illustration of the owner of an island who may not refuse entrance to one who is shipwrecked, the Lockean proviso is not a limit on the process of acquisition but on what one may do with one's property. *See id.* at 181. However, Nozick says elsewhere that the essential point is "whether *appropriation* of an unowned object worsens the situation of others." *Id.* at 175 (emphasis added). The reader is left puzzled over whether the Lockean proviso is a restriction on how one can *acquire* an entitlement to *P* or on how one can justly *use* that to which one already has an entitlement.

4. *Id.* at 159.

5. *Id.* at 160 (emphasis in original). The ban on interference in free choice is a link that connects Nozick's objections to the "end-state" principles of John Rawls, Bernard Williams, Marx, and any philosopher who would argue for redistribution of wealth based on need, merit, moral virtue, and so on.

in entitlement theory—what a person is entitled to depends on voluntary actions, either one's own in acquisition or the voluntary actions of others in transfers and rectification.

Taking note of the central role of voluntary action in entitlement theory, we arrive at a simplified version of the first two principles of entitlement, which we may call “the free choice version” of the entitlement principles. It is as follows:

A is entitled to and therefore has a right to *P* if and only if *A* or someone else chooses to do something (appropriation, gift, or exchange) that results in acquisition of *P* and that does not violate anyone's Lockean rights.⁶

Given the emphasis on free choice in entitlement theory, it is not surprising that Nozick favors a free market system as a system of property distribution that is consistent with the entitlement principles of justice.

FREE CHOICE AND A MARKET ECONOMY

Since Nozick believes that a free market system meets the requirements of justice as entitlement, one way to test entitlement theory is to ask of a free market system the three questions posed at the outset of this Article.⁷ Is it true that in a free market system everyone is entitled to what they have? Is it true that they have a right to what they have? If all individuals in a free market system have a right to their property, do they all have the exclusive right to what they have? Since a necessary condition for an affirmative answer to all three questions is that the holdings of individuals in a free market system result from someone's free choices, one important question to keep before us is

6. Someone might argue that an entitlement to *P* need not entail that someone chooses to do something from which *P* results, on these grounds: The only necessary condition concerning free choice is that no individual's free choice be interfered with. On such an interpretation, *A* would be entitled to the goose that lays the golden eggs should the goose fall in *A*'s lap and no one else be made worse off by *A*'s accidental receipt of the goose and her eggs. The problem with this interpretation of entitlement is that it allows cases such as the “goose with the golden eggs” case which do not appear to fit any of the three entitlement principles; it is neither acquisition, nor transfer, nor rectification. All three principles entail someone's choosing to do something—to labor, to give away, to sell or buy, or to receive through a correcting of an unjust set of holdings.

7. While Nozick does not unambiguously argue for a free market system, he is committed to a system of voluntary exchanges in which individuals are entitled to the results and no more than the results of their own or others' voluntary actions. He sometimes refers to this system as a competitive market. R. Nozick, *supra* note 1, at 182, 302. *See id.* at 156-60. He rejects all the usual arguments against a capitalist market system and offers a continuing array of examples of just entitlement from a free market system. At one point he refers to the entitlement principles as the principle of “natural liberty.” *Id.* at 213. Then he quotes Rawls' definition of “the system of natural liberty” as “regulated by the arrangements implicit in the conception of careers open to talents. These arrangements presuppose . . . a free market economy.” J. RAWLS, A THEORY OF JUSTICE 72 (1971), *quoted in* R. Nozick, *supra* note 1, at 213.

whether or not choices in a free market system are "free" in the requisite sense.

Nozick introduces the question of voluntariness when he anticipates a familiar objection to a free market system. In such a system, it might be argued, factory workers' shares in kinds of work are unjust. Workers have meaningless tasks, but they are entitled to more meaningful work. Following the free choice version of entitlement, Nozick replies that workers in a free market system are free to choose more meaningful work. If they do not, then they get what they are entitled to. Furthermore, the factory owners are entitled to whatever extra profits result from workers' doing less meaningful work, since only *voluntary* transactions (work freely done for wages freely paid) have given rise to those profits.⁸

Nozick attempts to defend capitalist economy by arguing that the market responds to the choices of workers. He asks: "How does and could capitalism respond to workers' desires for meaningful work?"⁹ His answer is that productivity will reflect their desires.¹⁰ If productivity rises as the meaningfulness of work rises, then the factory owners will "reorganize the productive process," presumably to substitute more for less meaningful work. If productivity remains the same, "then in the process of competing for laborers firms will alter their internal work organization."¹¹ This must mean that some, though not all, factories will provide more meaningful work. In that case, whether or not productivity rises or stays the same, workers would have the choice of more meaningful work. If they do not choose it, in Nozick's view they are not entitled to it. Suppose that Nozick is correct in his description of the market's response to workers' desires. We must still be willing to agree with Nozick that the choices of workers in such a system are free choices. I will argue that some cases fit under Nozick's umbrella of "free choice" that would not fit in a genuine voluntary scheme for obtaining goods and choosing among viable work options.

Consider the following example that is perfectly consistent with a free market system as Nozick envisions it. A worker *W* is employed in a factory that produces a product called drudgery, a product some people like to buy because they are intrigued by the idea that only drudgery could produce such an item. Suppose further that *W* cannot find another job, has no savings, and has good reason to believe no one will help her until she can find another job. Does *W* have an alter-

8. See R. Nozick, *supra* note 1, at 262-65.

9. *Id.* at 248.

10. *Id.*

11. *Id.*

native to choosing such meaningless work? Of course, she could choose to quit her factory job and see what happens. But suppose no work or help materializes. Has she chosen to starve? Either *W* works at drudgery or she starves. This is the choice she has. That is, if cases such as *W*'s are really cases of choosing less meaningful work, even when more meaningful work might eventually become available, it must be true that *W* could have chosen to wait for the more meaningful work, which would be for *W* to choose to starve. The more likely description of *W*'s case is that if she chose her position at all, she chose it over starvation, not over more meaningful work. If describing *W*'s continuing to do drudge work as a choice gets its plausibility from describing her alternative as starvation, then starvation in such a case would be a voluntary action. Nozick is then committed to accepting a market system as "free" that includes starvation among possible "free" choices. On Nozick's theory, *W* is entitled to her drudge job and it is consequently just that drudgery should be her share since she could have chosen an alternative.¹²

Consider the position of the owner of the drudgem factory. Is she entitled to the profits from *W*'s contribution to the production of drudgems? Unless *W*'s "Lockean rights against force, coercion, and so on" are violated without compensation, the owner's profit is part of a productive exchange and she is entitled to it. Since *W* receives wages high enough to provide her with food, and the owner receives some profit from marketing the drudgems *W* helps produce, "both parties do benefit in the sense of being the recipients of productive activities."¹³ Nozick's requirement for productive exchange is thus met and the owner is entitled to her marginal product from *W*'s work in the drudgem factory.

Are *W* and the factory owner entitled to their shares in this case? The answer is a qualified "yes." *W* is entitled to what she chooses, even where her options are severely limited, in a way that she is not entitled to what she needs. Even if some needs can give rise to entitlement, and Nozick argues that they cannot, entitlement based on the need for food or health care would at least be entitlement of a different sort than entitlement based on choice. Furthermore, no clearly identifiable individual coerces *W* to take drudge work. The *facts* of the

12. There are certainly difficulties for any account of "free choice" that depends on the "could have done otherwise condition." I do not resolve those difficulties in this Article. I merely wish to give *some* weight to our ordinary understanding of "free choice" as choosing *X* from among one or more viable alternatives to *X*.

13. R. NOZICK, *supra* note 1, at 84-86. "If marginal productivity theory is reasonably adequate, people will be receiving, in these voluntary transfers of holdings, roughly their marginal products." *Id.* at 187.

economic system and her own bad luck may force her choice to do drudge work, but no *person* does. Nozick would certainly be correct about that. Thus *W* would not be entitled to more than her chosen work on the basis of choice alone.¹⁴ The factory owner certainly has a *title to*, and in that sense is entitled to, her profit from *W*'s work. *W* is not coerced by her employer to work at the drudgery factory. Therefore, *W* and the factory owner are entitled to their shares or marginal products resulting from *W*'s labor.¹⁵

Does *W* have a *right* to no more than drudge work? Does her employer have a *right* to the profits that are dependent on *W*'s strained circumstances? Entitlement does not establish rights in these cases because *W*'s situation is so strained that she is not acting voluntarily in the sense needed for a "voluntary scheme of holdings" when she continues her drudge job. This point is clearest if we imagine *W* facing unemployment, a situation that most economists agree is inevitable in a free market economy.¹⁶ Under Nozick's analysis of voluntary action, we must conclude that *W* is free to choose to beg or to starve. Whatever *W* does in such a case is voluntary because it meets Nozick's criteria for action that is voluntary. The support for my "no" answer to the question of whether *W* and her employer have a right to their shares will come from a rejection of Nozick's analysis of "voluntary action under severely limited options." If *W* and her employer have a right to their shares, it must be the case that *W* acted voluntarily in continuing to work at the drudgery factory. Her action is voluntary only if Nozick's analysis of "voluntary action" is successful.

Nozick's analysis of "voluntary action under severely limited options" may be summarized as follows: An action is voluntary, though chosen among severely limited options, if the options are limited by facts of nature or by the actions of others who had a right to act as they did.¹⁷ The first kind of limit on options to an action *X* that fails

14. However, one might argue, as T.H. Green does, that a person is entitled to the necessary requirements for making rational choices—health, education, and the like. See T. GREEN, *Lectures on the Principles of Political Obligation* (Ann Arbor, 1967). In an affluent economy in which needs can be provided, one would expect such an argument to be even more persuasive. Nevertheless, Nozick would still maintain that providing needs violates the rights of those who would have less as a result of distribution based partly on need, such as a tax system. See R. NOZICK, *supra* note 1, at 149-53.

15. If in response Nozick claims that protection of free choice is a necessary condition for entitlement as well as for rights, then *W* and her employer are not even entitled to their shares, since *W*'s choice to do drudge work is not a *free* choice in the sense necessary for a free system of property distribution. What I wish to preserve by separating entitlement from rights is Nozick's insight that there are cases in which one's options are severely limited but no specific *agent* of coercion is present. It does not follow, however, that no coercion is present.

16. See P. SAMUELSON, *ECONOMICS* 238, 359-62, 588 (1961). Samuelson substitutes high employment or non-mass-unemployment for the goal of full employment.

17. See R. NOZICK, *supra* note 1, at 262.

to render X nonvoluntary is any limit imposed by facts of nature. This class of voluntary actions limited by facts of nature would include such actions as the fleeing of individuals before the waters of a broken dam or flash flood. Given the condition that A 's action X is voluntary only if A could have chosen not to do X , these flood victims could have, according to Nozick's analysis, chosen to "go down with the ship." An equally plausible description of the flood victims' case would be that they could not have chosen to do otherwise, and therefore their action is not voluntary. To the minimal degree that flood victims could choose to stay in their homes, it represents at best a borderline case of voluntary action.

Nozick's analysis obscures the distinction between such borderline cases and more paradigmatic cases of voluntary action, such as a college teacher choosing an academic over an executive position in industry. Yet it is just such an analysis of "voluntary action under severely limited options" that is needed to make W 's case one of voluntary action, and it would do so even if W were faced with unemployment. Surely, we would expect some relevant differences between the concept of "free" as it is persuasively employed by the libertarian proponent of a free enterprise system, and "free" in the description of the choice of a flood victim to evacuate. Nozick's analysis is thus part of an argument designed to undercut the critic of a free market system who maintains that choices in such a system are not always free and the resulting holdings consequently are not always just. The burden is on Nozick to show why there are not relevant differences between W 's choice to continue at the drudgery factory rather than starve and a college professor who chooses to teach rather than make more money with I.T.&T. Nozick actually cites the example of the college teacher to show that individuals in a free market system may give up greater earnings for more meaningful work.¹⁸ Surely, the two cases are not equally voluntary choices of what work to do, although they are equally plausible examples of work choices in a free market economy. Are we to say, as Nozick apparently would have us say, that W prefers less meaningful work, while the college teacher prefers more meaningful work? What is needed to make Nozick's analysis persuasive is an *argument* explaining why "voluntary" in a voluntary scheme of holdings should function as Nozick thinks it functions in situations limited by natural disasters.

The second kind of limit on alternatives to an action X that fails

18. *Id.* at 248-49.

to render *X* nonvoluntary is the action of others who have a right to act as they do. The most serious difficulty for this part of Nozick's analysis of "voluntary action under severely limited options" is its circularity. Suppose that *A*'s alternatives to doing *X* are seriously limited by something individual *B* does. Under Nozick's analysis, *A*'s action *X* is voluntary if *B* has a right to act as he does. Suppose *A* is counting on *B* to help in the building of a new barn. If by diverting a stream on her land instead of helping *A*, *B* violates no one's Lockean rights, then she has a right to put her energies into her own project instead of *A*'s barn building project. *B* diverts the stream, leaving *A* to build his barn alone, but *A* abandons the barn building since he cannot proceed without *B*'s help. Is his choice to abandon the building of the barn voluntary? We cannot answer that question using Nozick's analysis until we answer another question: Does *B* violate anyone's Lockean rights in diverting the stream? The answer depends on whether she interferes with anyone's right to voluntary action when she diverts the stream. We cannot determine if *B* violates anyone's Lockean rights until we determine what voluntary action is, yet we cannot determine what voluntary action is until we determine what violates someone's Lockean rights. Thus, this second part of Nozick's analysis is circular.

Suppose that *A* claims that *B*'s diverting the stream forces him to irrigate his land from another source, since the stream runs on his land as well as on *B*'s. Does *B* force *A* to act in a way he would not voluntarily choose, namely forcing him to look for additional water sources? The answer depends on what we accept as an analysis of "voluntary action under severely limited options," so we cannot make the analysis "depend upon whether these others had the right to act as they did."¹⁹

The absence of a persuasive argument for accepting the first part of Nozick's analysis, and the circularity in the second part of his analysis, prevents Nozick from strengthening the conclusion that action in a free market system that determines shares in work is always voluntary. Even if individuals in a free market system have some claim on or entitlement to their shares in work, it does not follow that they have a right to those holdings. As Nozick himself argues, a right to holdings entails that those holdings result from free choices in voluntary action. If we reject Nozick's analysis, *W*'s choice to do drudge work does not seem to be an obvious case of free choice in voluntary action.

This brings me to the final question: If *A* has a right, because

19. But see *id.* at 262. Nozick is quite willing to describe taxation as "forced labor," but not *W*'s drudge work. *Id.* at 169.

she is entitled to *P*, does *A* have the exclusive right to *P*? The only rights Nozick recognizes are Lockean rights *against* force, deception, blackmail, theft, physical injury, and, in general, any undue restrictions on doing what one chooses. Since *A* is entitled to *P* only if actions resulting in *P* do not violate anyone's Lockean rights, there can be no conflicts between the rights to *P* and other rights in an entitlement theory.²⁰ Accordingly, the property rights that Nozick accepts are primarily negative rights against uncompensated interference. The category of rights one might expect to conflict with property rights are, as Nozick anticipates, positive rights "to various things such as equality of opportunity, life, and so on."²¹ The only argument he offers against such positive rights is this: "[T]hese 'rights' require a substructure of things and materials and actions; and *other* people may have rights and entitlements over these."²² This argument merely asserts that there would be a conflict of rights; it does not state why such a conflict is unacceptable. The reason for always rejecting conflicts between rights is given much earlier in the book when Nozick argues for the moral side-constraint view that it is never morally permissible to violate individual rights.²³ A conflict of rights would entail that in resolution some rights were violated—a conclusion Nozick must reject.

There are at least two aspects of the entitlement theory that appear inconsistent with the ban on violating rights. One is Nozick's analysis of voluntary action and the other the principle of rectification—the third entitlement principle. If I am correct in my claim that his theory leaves room for violation of rights, then Nozick cannot appeal to the moral side-constraint view as justification for his contention that *A*'s right to *P* is exclusive—his own theory would violate that constraint.

I have already suggested problems for Nozick's acceptance of a free market system. If, as he has maintained, the right to free choice is basic to justice, then an economic system which Nozick accepts as just appears to violate the ban on violations of rights. He has argued

20. As Baruch Brody notes, this is a strong claim about property rights. If it is true, property rights not only cannot be overridden, but there are no conceivable losing candidates for rights that might conflict with property rights. B. Brody, *Political Philosophy and the Theory of Rights* 10-12 (unpublished paper read at the University of Texas at Austin, Oct. 2, 1975). Furthermore, Nozick adds that "the central core of a property right in *X* . . . is the right to determine what shall be done with *X*." R. NOZICK, *supra* note 1, at 171. It follows that a "free system will allow [an individual] to sell himself into slavery." *Id.* at 331. Although the whole thrust of his book is against anyone who believes some have a right to the fruits of others' labor, Nozick has no difficulty believing either that some may give up their property rights in themselves, or that some may have a property right in other persons.

21. R. NOZICK, *supra* note 1, at 238.

22. *Id.* (emphasis in original).

23. *Id.* at 28-29.

that a free market system does not violate some individuals' rights to a choice between meaningless and meaningful work, when in fact it does, if the concept of "voluntary action" does not cover choosing between starvation and drudge work.

Furthermore, Nozick's analysis of "voluntary action under severely limited options" leaves it undetermined when an individual's Lockean right to voluntary action is violated. To determine when individual rights have been violated it is necessary to know how much is covered by the Lockean rights against force and coercion. Nozick explicitly rejects blackmail because it violates Lockean rights, but what about media and public relations manipulation? Does a free market system allow advertising? It would seem a necessary concomitant to establishing demand for goods. Is false advertising a form of coercion? A reasonable case can be made for the claim that the power of subconscious manipulation by advertising *forces* needs on consumers. If government restrictions on advertising are permissible within Nozick's theory, then a more extensive state is likely to evolve from the minimal "night-watchman" state Nozick accepts.²⁴ If such restrictions interfere with a free market system, then individual rights to choose what to buy or sell without insidious manipulation may be violated. Either alternative would violate some rights to noninterference guaranteed in a minimal state.²⁵

Finally, Nozick introduces an element of more than minimal coercion with the rectification principle. He has remarkably little to say about this principle, but what he does say appears to be inconsistent with his ban on violating individual rights. Concerning rectification he writes: "Although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them."²⁶ A more extensive state violates Lockean rights in Nozick's view. Therefore, where rectification is called for, a conflict between rights is unavoidable and indeed justifiable, even when the conflict is between rights *derived from entitlement*. If in rectification some Lockean rights are overridden by others, then Nozick's absolute rejection of positive rights to things because others have rights to those things

24. This evolution will occur perhaps by an "invisible hand process," a notion utilized extensively by Nozick to justify the minimal state itself.

25. Nozick refers to the service a free market economy provides "by providing us things we will want to pay for." R. Nozick, *supra* note 1, at 231. Yet, he ignores any problem about how to determine *what* "we will want to pay for." Too often economists of free enterprise presuppose the perfect rationality of the buyer, overlooking vulnerability to public relations and advertising gimmicks,

26. *Id.*

loses its rationale. The theoretical door is thus opened to those who, like Rawls and Marx, wish to argue for general rights to those holdings necessary for formulating a rational life plan and living accordingly.

CONCLUSION

Where *A* is entitled to *P*, *A* does not necessarily have a right to *P*. Where *A* has a right to *P*, *A* does not necessarily have an exclusive right to *P*. These conclusions are consistent with a theory of justice in holdings that emphasizes the importance of protecting free choices as Nozick's theory claims to. However, while I hope to have shown that entitlement is not sufficient to determine property rights, I have not shown that entitlement to *P* is not a necessary condition for a right to *P*.