

WHY LIBERTARIANS SHOULD REJECT POSITIVE RIGHTS

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Introduction

IN “WHY LIBERTARIANS SHOULD BELIEVE in Positive Rights” (presented at the Austrian Scholars Conference 2006)¹ Nico Maloberti offers a reformulation of libertarianism that does not preclude the possibility, in principle, of a legitimate state. This is done through the introduction of “Samaritan rights,” the right to be saved from a dire situation when someone is able to do so at a minimal cost to himself.

The purpose of the present paper is argue that Samaritan rights should, at the very least, not be accepted as enforceable rights, and therefore do not justify the existence of a state. It will then follow, of course, that Maloberti has not shown that a state is, in fact, justified in principle. With this in mind, I will focus my attention on part 2 of Maloberti’s paper, in which he develops Samaritan rights. In part 1, Maloberti had argued that classical libertarianism implies anarchism, a claim which seems to me to be eminently true.

He also seems to believe that this thereby invalidates classical libertarianism, but I have no idea why this should be the case. I will also not comment on part 3, which explains some benefits to libertarians of accepting Samaritan rights, since I am arguing that Samaritan rights are simply wrong. It therefore doesn’t matter to me if they would be useful.

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The Classical Libertarian

Maloberti's first task is to show that the classical formulation of the libertarian position does, in fact, preclude the possibility of a legitimate state, even in principle. Since I agree that it does, I have no reason here to argue with this claim. I will, however, note in passing that Maloberti's presentation of the classical position is not quite correct.

Specifically, Maloberti writes: "Traditionally, it has been claimed that the morally problematic nature of the state arises from the mere use of coercion."⁽¹⁾

It would be more correct to say that the traditional position is that the state is illegitimate because of its initiation of force, not simply the use of coercion. As Maloberti (1–2) notes, there is nothing wrong with the use of force in self-defense, and the traditional characterization of libertarianism does not suggest that there is. There is also nothing wrong with using force to defend others when the force is used only against those attacking others, this is a derivative legitimate use of force. The problem with the state is that it does not and cannot confine its uses of force to these situations—it depends on the initiation of force for its acquisitions of resources to begin with. If it failed to do so, it would be a business firm, not a state. It further initiates force in requiring all within its territory to become its "clients," as it were. So, the objection is not that it is illegitimate to defend others by using force, but that this is not all that the state does.

Maloberti next claims that this situation makes classical libertarianism absurd, because it cannot be the case that the state is categorically illegitimate. I see no strong argument presented for this, and I do consider the state categorically illegitimate. A stronger way to present this case, I believe, would be to do away with the "absurdity" claim and simply use the next argument Maloberti will produce—that Samaritan rights justify initiation of force, and that protecting Samaritan rights is indeed a rationale for a state. I will, therefore, turn now to a consideration of Maloberti's argument for a state that defends Samaritan rights.

Do Samaritan Rights Exist?

Such a case would have two parts. First, it must be shown that Samaritan rights exist; second, it must be shown that it is legitimate to enforce these rights. Maloberti's first argument for the existence of Samaritan rights is an appeal to intuition: "Could we plausibly deny, after all, that by not

getting down on our knees to save a baby from drowning in a shallow pond of water we are doing something that, all things considered, we should not do?” (5) The obvious problem with arguments of this sort is that they can be disarmed entirely simply by responding “yes.” After all, if the force of the argument rests entirely on intuition, my competing intuition that I am entitled to do as I wish with my property, including my body, is just as valid.

More substantially, the entire set-up is questionable. Maloberti assures us that Samaritan rights apply only when the person in a position to perform a rescue can do it at a minimal cost to himself: “It is common to regard mere Samaritan duties as limited by the proviso that the aid to others must not be unduly costly to oneself.” (8) What is an undue cost? Perhaps the person being considered here has severe arthritis and getting on his knees would be very painful. Maybe he has religious beliefs banning the practice of falling onto one’s knees except in prayer. So it would seem hard to determine, in a particular situation, whether or not a right existed. Fortunately, this is not Maloberti’s only argument. Let us now turn to a consideration of the second argument he presents.

The second argument for the existence of Samaritan rights is an argument from supererogation. The argument can be summarized as follows. Imagine that A is in a dire situation, and B is capable of saving him at minimal cost to himself. Then if A is to be morally forbidden from forcing B to save him, we will be requiring that A act as a hero—that is, sacrifice himself simply to avoid violating the moral code. Since morality should not require heroism, we conclude that A has a right to force B to help him. (6–7)

There are some difficulties here. First, Samaritan rights will be of an odd type if this is to be their justification. It only makes sense to say that A is acting heroically in not forcing B to help him if, in fact, A is able to force B to help him. So, if B is beyond A’s reach, or if A is the baby in the previous example, this argument will not show that a Samaritan right exists. A drowning baby, unable even to lift its head, is not acting heroically in refraining from forcing an adult to save him—it is acting in a way limited by nature. So in this case, which obviously is a case in which Maloberti wants to say a Samaritan right exists, no right will exist. That the supposed proof of Samaritan rights does not, in fact, work in all cases that Maloberti wants Samaritan rights to exist in is very problematic. It will also create serious difficulties later, of course, when we consider the extension of Samaritan rights as rights to Samaritan rights as enforceable rights.

Second, it does not seem impossible to hold that, in fact, in extraordinary circumstances morality does require heroism. To draw a fine

point, Maloberti himself accepts this. Consider that Maloberti limits Samaritan rights to situations fitting 4 circumstances (none of which is the one identified above). These are:

1. The situation must truly be dire.
2. The dire situation must not have been caused by A.
3. The aid must be strictly necessary to overcome the peril. That is, the aid must be such that it will actually save A, and must be the only way for A to be saved.
4. As discussed above, the cost imposed on B must be small. (7–8)

It is remarkably easy to see that there are situations where A would be acting heroically in not forcing B to help him, yet the situation does not meet these conditions, so Maloberti would hold that A has no Samaritan right. The easiest way to see this is by again using condition 4. If A is in danger of death from disease, and B can help him only by selling his house and living in a tent, A is still acting “heroically,” it would seem, in not forcing B to do so. So in such a case, Maloberti would agree that A may be morally required to act heroically. This doesn’t do much for the plausibility of the “no heroism” claim.

The same point can also be seen by considering requirement 3. If A is again in mortal danger, and there are two people, B and B’ who are equally positioned to help him, may A force B to help him? The answer, according to Maloberti, is clearly no, since this is not the only way for A to save himself—he can also force B’ to save him. On the other hand, he may not force B’ to save him for similar reasons. So it seems that Maloberti’s Samaritan rights can fail to exist because the position of “possible saver” is multiply realized, while the heroism requirement remains.

The point here is not simply that the heroism argument proves more than Maloberti wants. The point is that even Maloberti, the very person advancing the argument, is not prepared to embrace its consequences, which gives us reason to suspect that the argument itself is flawed, and the requirement that morality never dictate that a man be a hero is not a good requirement.

Are Samaritan Rights Enforceable?

Nothing said so far, I admit, would show that Samaritan Rights categorically do not exist. I will, however, conclude that Maloberti has not shown them to exist. Conceding that they may still exist, I now turn to the second claim—given that Samaritan rights exist, that they are enforceable. By enforceable, I will understand either enforceable by A, or by others. Maloberti argues that if Samaritan rights are enforceable by A, then they are enforceable by others on behalf of A, (5) and that if they are enforceable by others on behalf of A, then it is legitimate to form a state which will go about protecting Samaritan rights. (6)

The latter implication is, I think, uncontroversial, if not tautological, since in the antecedent we have already accepted that an unaffected group may initiate force against B (and others in B's situation) which is the only objectionable action that Maloberti's state would engage in anyway. That in practice the state would not remain confined to these activities is an important point, but does not seem to be relevant to Maloberti's theoretical point. Even if a state which does nothing but enforce Samaritan rights can be shown to be impossible, it does not follow that it is unjust (although it might not be wise to try and establish one.) The former implication, though, requires some comment. While I would usually be inclined to agree with it, in context it appears at odds with Maloberti's supererogation argument for Samaritan rights. Since Samaritan rights, in order for the supererogation argument to work, would only exist where A is able to force B to help him, and to do so successfully (by condition 3) it isn't clear why it becomes right for others to force B on behalf of A. In other contexts, we accept intervention by others on behalf of an individual because that individual cannot do what is needed. For instance, we accept that self-defense implies "other defense" because we acknowledge the possibility that the person to be defended might be attacked by someone much stronger than he is. But this very possibility is precluded by offering the supererogation argument here. However, since it is not necessary for my argument that I deny this implication, I will also, for the sake of argument, assume this implication to be correct.

The Knowledge Factor

Before saying that A has an enforceable right against B, which is equivalent to saying that A and/or others may initiate force against B in order to enforce his right, it is reasonable to require two necessary (but not necessarily sufficient) conditions:

1. That A have a right to B's help.
2. That the person initiating force, whether A or others, know that A as such a right.

While 1 has been assumed for the time being, I wish to challenge the very possibility of 2 being satisfied. The difficulty here comes from Maloberti's having introduced a subjective condition, the fulfillment of which is known only by B—namely, condition 4. The cost of helping A is entirely subjective. The cost, for B, is determined by the action which B ranks highest on his preference scale, given his resources. It is clear that this highest-ranked action is not helping A, or else we wouldn't need any force anyway. What is not clear is what it is, and therefore, what the cost for B is. How, then, can the person initiating force ever claim to know that only a "small" (assuming we define this term somehow) cost is being imposed on B?

Of course, one way to know is to ask B what the cost is. But, if Samaritan rights are enforceable rights, it seems reasonable that B would know that Samaritan rights are enforceable rights. B need not believe that Samaritan rights ought to be enforceable rights; he will know, however, that others will enforce Samaritan rights against him in the appropriate circumstances. When asked the question "Is the cost of helping A minimal?" B will consider this fact, too. Recall that B's answer cannot be proven or disproved by anyone else—his answer is final. So, if he wishes to not be forced to help A, he will simply say "No, the cost is quite high." If he wishes to be so forced, he will answer "Yes," but this is nothing less than B's volunteering to be forced to help A—which is the same as B agreeing to help A anyway. It would be a very strange enforceable right, indeed, that requires the agreement of the person it is being enforced against. Put more strongly, such a thing is not an enforceable right at all.

A Possible Objection

It might seem that the foregoing argument is weak in the following sense. The argument seems to be based not on the strength of Maloberti's argument, but on its weakness. Thus, you might think that Maloberti can evade it simply by strengthening his claim—perhaps by saying that the cost need not be minimal after all. This is true, but he would have to go very far indeed. If any reference at all to B's cost remains, the objection will still stand. Therefore, he'd need to remove any such reference, and say simply that if B is in a position to help A, then A has a right to such help, and that right is enforceable, regardless of costs. The argument then loses, I think, any

intuitive appeal that it had. Why should B be required to help A even if B's cost is higher than the potential cost imposed on A by the danger in the first place?

Maloberti can, it would seem, perhaps save some of the intuitive appeal of his argument by limiting it to situations where A is in danger of death. Then it would seem that the cost imposed on B cannot be higher than the cost imposed on A—the highest it can be is equal, since death is the highest cost. This, however, is an illusion. Since we cannot get into B's head, we don't know if death is in fact his highest cost—he might prefer death over other options, such as taking out the garbage. A student told me once he'd sooner die than fail my class. I told him that since he hadn't turned in a single assignment or paper, it seemed he'd also sooner die than write an assignment. He responded that preference schedules need not be consistent across time. This earned him a passing grade. In any event, if you doubt that one can prefer death over other costs, consider that preference is expressed in action, and the actions of those at Masada clearly indicated just such a preference schedule. So do the actions of any successful suicide.

Conclusion

It has been shown that Maloberti's argument for Samaritan rights does not establish the existence of Samaritan rights. Furthermore, if we grant that Samaritan rights exist as abstract rights, it does not follow that we can identify, in a particular situation, whether the right exists for that given person. As a result of this difficulty, it is not the case that someone may initiate force in defense of Samaritan rights, since he would have to know that a right existed. Since the state exists only by initiating force, any attempt to justify a state must justify some initiation of force. Since Samaritan rights cannot do that, they cannot justify a state.