

LIBERTARIANISM AND POSITIVE RIGHTS: COMMENTS ON KATZ'S REPLY

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IN “WHY LIBERTARIANS SHOULD REJECT Positive Rights,”¹ Joshua Katz offers a critical response to the argument I develop in “Libertarianism and the Possibility of the Legitimate State.” Although Katz raises some interesting points regarding the limits of a particular line of argumentation that can be found in that article, I think his response fails on two accounts. First, it fails to grasp the nature of the problem my article is ultimately concerned with. Second, it fails to present a solid case for the rejection of the type of positive right that I argue libertarians should endorse as a solution to that problem.

Contrary to what Katz seems to suggest, the purpose of my article is not to provide a justification for the state. At the beginning of the article, I draw a distinction between the question about the *possibility in principle* of the legitimate state and the question about the *possibility in practice* of the legitimate state. The former question concerns whether there is a set of conceivable conditions under which the performance of the state's characteristic actions (taxing its subjects and monopolizing the provision of justice) is morally permissible. The latter question concerns whether such conceivable conditions do actually obtain. The article only deals with the first question. It argues that we should acknowledge the existence of certain conceivable conditions under which it would be morally permissible for the state to do what it typically does. The article does not claim that those conditions are actually satisfied. I use this distinction in an attempt to draw our attention to a theoretical problem that the classical formulation of libertarianism seems to face.

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¹Joshua Katz, “Why Libertarians Should Reject Positive Rights,” *Libertarian Papers* 1, 6.

Katz claims that the fact that classical libertarianism implies anarchism does not show that classical libertarianism is absurd.² But it should be clear that this is not quite the argument I am offering in my article. The argument is, rather, that the classical formulation of libertarianism implies the impossibility in principle of the legitimate state, and that *this* is implausible. In addition to full self-ownership, libertarianism is usually formulated as establishing the illegitimacy of all compulsory transfers of justly acquired holdings and the permissibility of all voluntary transfers of such holdings. But the state requires its subjects both to pay for the protection of their own rights and to refrain from enforcing those rights by their own private means. The state, therefore, must be illegitimate. Contrary to what Katz claims, this is not what worries me. As I see it, the problem is that the classical libertarian case against the morality of the state is a case completely disconnected of all empirical considerations. According to the classical formulation of libertarianism, the state would be illegitimate regardless of the nature of the stateless society.

Katz does not seem to acknowledge the existence of any problem with the classical formulation of libertarianism. Perhaps this is due to a misunderstanding of my arguments. Could we really believe that a plausible political philosophy would establish the moral impermissibility of the state regardless of how horrible the stateless condition were to be? My point is that no plausible political philosophy could establish such a thing if a state could remedy a terrible situation imposing only minimal costs on its citizens. My point is neither that a plausible political philosophy must establish the moral permissibility of the state nor that the stateless condition would be a horrible condition.

The purpose of Section II of my article is to argue that we might have reasons to acknowledge a particular minimal form of positive rights, what I call “samaritan” rights, and that such an acknowledgment might overcome the problem presented in Section I. The holders of samaritan rights would be the individuals who face certain perils, and they would hold these rights against those who have the capacity to place them out of peril at a reasonable cost when there is no other solution available. Following Christopher Wellman, I argue that if the existence of samaritan rights must be acknowledged in those non-political circumstances that familiar examples illustrate, and if not coercing people in the way the state does will bring about the same type of circumstance, we should also acknowledge the existence of

² Ibid, p. 2.

samaritan rights in that situation as well.³ Thus, a samaritan approach to political legitimacy would conceive the legitimate state as a mere enforcer of this minimal form of positive rights.

Endorsing a samaritan approach to political legitimacy would then entail that there is a set of conceivable conditions under which the performance of the state's characteristic actions is morally permissible. Such conditions are the conditions that must obtain for people to acquire samaritan rights: 1) the situation must truly be dire, 2) the perilous circumstances the samaritan right bearer faces must not be due to his own fault, 3) the aid that may be coercively secured must be strictly necessary to overcome the peril, and 4) the aid that may be coercively secured must not impose more than a reasonably low cost on others. The third condition is especially significant. It implies that samaritan rights will arise only when voluntary solutions are unavailable.

Thus, according to a samaritan approach to political legitimacy the state could be morally impermissible; but whether or not that is the case would depend on the truth value of certain empirical claims. I tend to believe that the assessment regarding the respective merits of the state and anarchy usually presented by anarchist libertarians is correct and, therefore, that according to a samaritan approach the state would not be justified. But, again, the purpose of my article is not to show that this empirical assessment is correct. The purpose of the article is to show that endorsing a samaritan approach to political legitimacy allows us to fully capture the moral significance of such discussions without having to endorse a utilitarian or consequentialist pattern of moral reasoning. It is along these lines that Section III of the article shows that, contrary to what we might think, the acknowledgment of samaritan rights would seem to provide a more adequate normative ground for making sense of some central libertarian insights and concerns. But Section II is the major focus of Katz's criticism. He believes that I have failed in showing the existence of samaritan rights. Thus, regardless of whether samaritan rights could provide a theoretical service to libertarianism or not, he argues that we are not entitled to appeal to them.

According to Katz, a case for a samaritan approach to political legitimacy has two parts.⁴ First, it must be shown that samaritan rights exist.

³See Christopher H. Wellman, "Liberalism, Political Legitimacy, and Samaritanism," *Philosophy & Public Affairs* 25 (1996): 211–37; "Toward a Liberal Theory of Political Obligation," *Ethics* 111 (2001): 735–59; and "Samaritanism and the Duty to Obey the Law" in Christopher Heath Wellman and A. John Simmons (eds.) *Is There a Duty to Obey the Law* (Cambridge University Press, 2005), pp. 3–89.

⁴ *Ibid.*, p. 3.

Second, it must be shown that it is legitimate to enforce those rights. In my article, I understood samaritan rights as valid claims to use coercion in particular ways. What Katz refers to as the question of whether samaritan rights exist is what I refer to in the article as the problem of the existence of positive obligations (or mere samaritan “duties”). But this is just a terminological issue. As Katz notes, my discussion of samaritan rights involves two different claims. The first claim is that people should aid others when such aid is strictly necessary to place those others out of peril, and when they can do so at a no unreasonable cost to themselves. The second claim is that people may use coercive force to secure such aid against those who are obligated to provide it. Katz seems to deny the validity of both claims.

Katz says that my argument for the first claim is a mere appeal to intuition, and that he questions the universality of such an intuition.⁵ I did not really take myself to be presenting an argument. I simply assumed that the claim regarding the existence of samaritan duties was not controversial. I claimed that “only few will deny that there are positive obligations when it comes to emergencies situations,” and then went ahead to discuss the usual libertarian opposition to the enforceability of such duties (what I call samaritan rights). Perhaps Katz is among those few who will deny that we should assist others in a dire situation if doing so is not unduly costly to ourselves. But if that is the case, he would seem to be the one holding the position in need of greater argumentative support. Surely, as Katz argues, special conditions might exist under which saving the baby from the shallow pond of water will impose an enormous cost on us. But this is beside the point. The question is whether the moral obligation holds when that cost is not unreasonably burdensome.

Katz refers to my argument for the enforceability of samaritan duties as the argument from “supererogation.” It is worth noting, however, that I used the notion of supererogation only in reference to the particular argumentative purpose of J.O. Urmson’s essay “Saints and Heroes.”⁶ The argument for the enforceability of samaritan duties was intended to be the more general idea that there are certain actions that, due to their demandingness, no plausible moral theory could request from us. To illustrate this point, and paraphrasing Urmson, I wrote that “morality cannot work under the assumption that

⁵ Ibid.

⁶ J.O. Urmson, “Saints and Heroes,” in Steven M. Cahn and Joram G. Haber (eds.), *20th Century Moral Philosophy* (Upper Saddle River, New Jersey: Prentice Hall, 1995), pp. 322–33. Originally published in A. I. Melde (ed.) *Essays in Moral Philosophy* (Seattle, WA.: University of Washington Press, 1958).

people are heroes.” Katz rightly claims, however, that the alleged bearer of a samaritan right would act heroically in not forcing others to aid him only if he is actually able to do that.⁷ But when he is not able to do that, Katz concludes that my argument will show, contrary to what I believe, that no samaritan rights would exist in those situations. This conclusion is not entirely accurate. For I did not claim that the conditions for heroism were necessary conditions for the existence of samaritan rights. Still, I think that Katz has rightly shown the limits of a particular line of argumentation that I used in the article. The notion of heroism is of no help when it comes to explaining how certain people (those who cannot act as samaritan rights would allow them to act) might actually acquire samaritan rights. Yet I think that the general point regarding the limits of morality still applies to those particular cases.

As libertarian theorists such as Loren Lomasky and Erick Mack have argued, the grounding of rights itself seems to appeal, at least in part, to the reasonableness of individuals declining to bear costs for the sake of others. But then, if the very grounding of rights is constituted by that idea, when the costs to an agent of abiding by another's admitted right is sufficiently great and the costs to the right-holder of having the right infringed is very small, it would seem to be quite implausible to insist in that the agent must bear that enormous cost.⁸ In his *Persons, Rights, and the Moral Community*, Lomasky notes that one would have reason to value the maintenance of a regime of rights because one values the ability to pursue projects, and rights accord to each rights holder a measure of sovereignty over his own life. But why should one value such a regime if it could be the case that those very same rights become an obstacle in the attempt to avoid the faultless extinction of one's prospect for project pursuit?

Katz also claims that, at least in extraordinary circumstances, morality may indeed require us acting heroically. And he claims that even my understanding of samaritan rights implies this. For if there are limits on the costs that people can impose on others with the purpose of overcoming some serious perils, then people may be required to endure such perils “heroically” if no unduly costly solution is available.⁹ Again, Katz seems to be right regarding the argumentative limits of an exclusive appeal to the notion of heroism. But the central point is, again, whether any plausible moral theory could require individuals to endure significant threats to the

⁷ Katz, “Why Libertarian Should Reject Positive Rights,” p. 3.

⁸ See Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987), pp. 135 *et seq.* Eric Mack, “Non-Absolute Rights and Libertarian Taxation,” *Social Philosophy and Policy* 23.2 (2006): 109–41.

⁹ Katz, “Why Libertarians Should Reject Positive Rights,” p. 4.

possession of their most valuable capacities, threats for which they are not responsible, even when there is an available alternative that involves the imposing of only minimal cost on others.

In considering the previous issues, Katz also suggests that according to my argument no samaritan rights could possibly arise in situations where there are potentially multiple “savers.” For I have claimed that samaritan rights arise when the required aid is strictly necessary to overcome the peril. But Katz will argue that when there are potentially multiple savers, the aid that any single individual could provide would not be strictly necessary.¹⁰ The same aid could be extracted from a different individual. As I explain in my article, however, the condition regarding the strictly necessary character of the aid implies that samaritan rights emerge only when voluntary solutions are unavailable. Thus, the aid that is morally demanded and that may be coercively secured must count as the only available alternative in *that* particular sense. There must not be a *voluntary* solution available. Facing the option of choosing among multiple savers we do not really face the option of performing different types of actions. Presumably, the principle of samaritanism would then establish the morality of choosing anyone among them.

Finally, Katz claims that even if I were right and people might indeed have samaritan rights, the subjective nature of cost would preclude us from knowing whether samaritan rights exist in any given situation¹¹. For he seems to believe that the only way of actually knowing whether the cost imposed on others is too high is to ask the relevant individuals. Furthermore, he claims that there is no external standard for evaluating the correctness of an individual’s assessment of costs, and that this would entail that samaritan rights could not be held against individuals who disagree with being the objects of such rights. Katz considers the possibility of rejecting the condition limiting the cost of aid that is morally permissible to force others to provide. But I agree with Katz that this condition is quite central to my argument. The idea that there are limits to what morality can require from us is not only important to ground the existence of samaritan rights. It is also important to reject the existence of more egalitarian forms of positive rights. I do not believe, however, that the subjective nature of cost imposes any serious challenge to my argument.

If we have good reasons to believe that a particular person regards certain costs in a similar manner as almost everyone else does, it seems quite implausible to claim that no coercion could be used against him on the

¹⁰ Ibid, p. 4.

¹¹ Ibid, p. 6.

grounds that, if asked, he might say something different. There might not be an external standard for evaluating the correctness of an individual's assessment of costs. But certainly, we can always question the veracity of what the individual tells us is his own assessment. In other words, we could always imagine someone claiming that getting his clothes wet in order to save the baby from drowning in the shallow pond was too costly for him. But what matters is not that someone could claim such things, but how plausible those claims are. I believe that only in extremely rare circumstances, too rare to pose any serious challenge to a samaritan approach to political legitimacy, those types of claims would turn out to be plausible.

At the risk of repeating myself, I would like to conclude by stressing that endorsing a samaritan approach to political legitimacy does not amount to more than endorsing the possibility in principle of the legitimate state. Whether the state is actually favored over the stateless society depends on certain empirical claims. Hobbes famously claimed that life in the absence of the state would be "solitary, poor, nasty, brutish, and short." If that is an adequate description of the alternative to the state, I believe that it might be permissible to infringe upon individuals' ownership and enforcement rights in the manner in which the state does, because under such extraordinary conditions individuals would acquire samaritan rights that allow them to do just that. But endorsing a samaritan approach does not entail that we should believe that Hobbes' description is an adequate description. The main point of my article is, precisely, that acknowledging the existence of samaritan rights provides a non-consequentialist moral framework under which the findings of the inquiry into the properties of a private market for justice and protection acquires full moral significance. This is why libertarians should believe in them.