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Problems With the Notion of Freedom and Voluntariness in Right Libertarianism[1]

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Abstract:
In this short paper, we investigate the problems with the employment of the notion of *freedom* and *voluntariness* in libertarianism. We pretend to demonstrate that these two, as conceived of by libertarians, figure in as the main issue when it comes to justifying its major institutions, say: bequeathing, gifts, transactions (or what they label as "voluntary transfer"). The difficulty here boils down to the fact that a purely rights-based idea of freedom and voluntariness, the pretentions of Nozick notwithstanding, cannot do alone, since it is the consideration whether we do something (e.g. bequeath, donate etc.) *voluntarily* (or *freely*) (in a non-moralized sense) that could account for the rights redistribution. Therefore, it seems that – at least sometimes – the notion of voluntariness (or freedom) is prior to the notion of rights.
Keywords: freedom, libertarianism, voluntariness.

1. Introduction

To leave no doubt as to the fact that libertarians subscribe to the view that the notion of freedom should be moralized; more specifically, that it should be rights-dependent, let us quote Rothbard to that effect:

> We are now in a position to see how the libertarian defines the concept of "freedom" or "liberty." Freedom is a condition in which a person's ownership rights in his own body and his legitimate material property are not invaded, are not aggressed against. A man who steals another man's property is invading and restricting the victim's freedom, as does the man who beats another over the head. Freedom and unrestricted property right go hand in hand [11, p. 50].

It seems that – let us take Rothbard for granted – there is a relation of equivalence between freedom and rights. If the man beats a man over the head, the former was not *free* to do so simply because he had no right to do so. And apparently the converse also holds true, if he were indeed free to hit the other man over the head, he would have to have a right to do so in the first place (the other could be the former's slave, or it could be a boxing match wherein the contestants give up their respective

rights not to be hit, thereby enjoying liberties to hit one another). This position is also present in Nozick's *Anarchy, State and Utopia*, who in turn settled the relation between *rights* and *voluntariness*.[2] This is evidenced by the following citation: "Other people's actions may place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did [8, p. 262]."

The concept of voluntariness is crucial for Nozick since his agenda is to resort to the idea of *voluntary transfer* to justify free markets with their oftentimes antiegalitarian distributions of income. The underlying intuition serving to justify any arising inequality of income distribution was manifest in his Wilt Chamberlain thought experiment [8]. The point was that it seemed intuitively clear that once a transfer was voluntary (that is, the fans kept paying Chamberlain so that he could continue to entertain them), any resultant income distribution must be just. Hence, liberty was presumed to be *justice-preserving* [3].[3] Yet, at first glance, it is not easy to spot that after all justice is about rights distribution and if it is an exercise of our liberty that preserves justice, liberty (or voluntariness of our choices for that matter) must, logically speaking, validate a new rights distribution and not depend on them.[4] However, Nozick was caught in a conceptual predicament and the reason is that he vigorously argued for *rights-based* notion of *voluntariness*. More specifically, as noted by Cohen, the central tenet of Nozick's libertarianism is the principle of self-ownership and if the Nozickian libertarianism mentions freedom this freedom is rights-dependent [8, p.4]. Hence, as Cohen argues, one cannot informatively (synthetically) argue that there are no unfreedoms on the free market since free markets (with its definitional requirement of no rights violation) necessarily do not recognize any unfreedoms that would be compatible with a free market arrangement [3]. Because freedoms are rights-based, then as long as rights are respected, it is necessarily the case that no unfreedoms can occur, which is a merely conceptual truth. For example, once we adopt the Nozickian rights-based notion of freedom, we are conceptually barred from saying that person A is rendered unfree to enter B's property without B's permission for A's freedom to enter B's premises is non-existent in the first place. Fair enough, but then saying that there are no unfreedoms on the free-market is just trivially true. Moreover, note that the fact that freedoms essentially depend on rights (one is conceptually prohibited from saying that one is unfree to do A when A has no right to do A) bars one from affirming any non-trivial informative relation between libertarian rights and freedom. Additionally, however tempted one may be, one is unable to informatively state that a libertarian society *maximizes* freedom. Or indeed, contrary to Nozick, one cannot make a case for a just distribution of resources based on people's voluntary choices alone (Wilt Chamberlain imaginary case), for voluntariness is defined in terms of rights. To illustrate the above point, let us consider how making a putative moral case for free-market might look like by the light of Nozick's theory. We would like to argue that a free market is the only social arrangement wherein there are no unfreedoms. Superficially, it looks like it is the apparent absence of unfreedoms that *justifies* the institution of free market (with freedoms and unfreedoms being defined – at least *prima facie* – independently of rights. However, freedoms are, in Nozick's view, defined in terms of rights (remember: no unfreedoms occur unless rights are violated). Therefore, it follows from the very definition of free market as the totality of rightful (somewhat pleonastically) exchanges of property titles that no unfreedoms occur. But we wanted to reason in the other direction: we wanted to justify free market *via* the absence of unfreedoms. Now, it turns out that the notion of free-market really assumed it. In short, our apparent case for free market is vacuous. Precisely the same vicious circle haunts the relation between rightfulness and voluntariness. The fact that we can press more or less the same charge substituting 'voluntariness' for 'freedom' aside[5], it is worthwhile to note that to account for any rights redistribution we must resort to the rights-independent notion of voluntariness (e.g. gift-giving). The argument for this appeals to the Hohfeldian notion of powers [5].

Eventually, we are going to argue that to make sense of the notion of right violation or the threat thereof (which is also illegitimate on libertarian grounds) we must appeal to some sort of rights-independent notion of consent. After this rather lengthy expository section, let us take a closer look at our successive points.

2. Nozick's Failure to Make a Case For Unbridled Markets

As already noted above, Nozick's attempt to make a case for unbridled markets reasoning from the absence of unfreedoms (or from fully voluntary exchanges, which, as presumed by Nozick, are justice-preserving) fails. And it fails instructively. We saw that Nozick resorted to a right-based definition of freedom. Hence, it cannot be the case that one is rendered unfree to do X if one did not enjoy a right to do so in the first place. Or conversely, a perimeter of our freedoms is marked *exclusively* by the rights we hold. Therefore, we are logically barred from saying that person A was rendered *unfree* to exclusively control this house only because person B acquired ownership of it. On the other hand, the only unfreedoms recognized by Nozick would be preventions of these actions which one *had a right* to take. So, if person A had a right to visit person B, then once A is prevented from doing so, A is effectively rendered unfree to do so. This point is sharply put by Olsaretti:

> That is: on Nozick's view, whether someone counts as free to do something, or whether he does it freely or *voluntarily* [underlining mine], depends on whether he has a right to act in that way. Conversely, someone who is prevented from doing something he has no right to do, or who finds himself in limited choice circumstances that are the result of others' acting within their rights, does not count as having had his freedom constrained in any way [9, p. 5].

However, as further noted by Oslaretti: "A person's freedom to ramble is undeniably limited by other people's private property rights, on a neutral definition of liberty on which we are unfree to do something if others prevent us from doing that thing or would prevent us from doing it if we attempted it." Olsaretti goes on to argue that:

> On such a definition of freedom, there is no relevant difference between the situation of the rambler, or the situation of a propertyless worker who accepts a hazardous job because the alternative is to starve, and that of Wilt Chamberlain and other talented citizens who, by Nozick's own reckoning, would count as having their freedom constrained by being forced to pay redistributive tax [9, p. 6].

It is now clear to see that an argument from freedoms justifying the free-market is (depending on the definition of freedom) either a) mistaken or b) question-begging. Let us analyze the two options:

a) If we adopt a neutral definition of freedom, then, as noted above, unfreedoms haunt free markets as well, for some agents are prevented from acting in certain ways simply because other agents enjoy property rights in some external resources (or in their respective bodies). A property right in a resource by definition entails an incident of exclusive enjoyment or control thereof[6], unless decided otherwise by the very owner. Hence, it is impermissible for other agents to use a resource in a question, unless its owner gives his consents and thus allows them to do so. Concluding, neutral (not rights-based) definition of freedom enables us to maintain that unfreedoms in a fully right-respecting free-market is a non-empty category.

b) On a rights-based definition of freedom, it is *trivially true* that as long as rights are respected no unfreedoms occur. Yet, this stipulative move (defining freedom in terms of rights) cannot contribute to formulating any significant (non-trivial) view relating free market to freedoms/unfreedoms. To illustrate the point, suppose socialists *stipulate* that only actions that can count as the ones we are free to do are the ones *compatible with socialism*. And then, it simply follows that socialism cannot (in the logical sense of 'cannot') bring about any unfreedoms. For any unfreedoms are (by definition) the ones in which socialist regime is inoperative and conversely: we deal with freedoms only *within socialism.* To conclude, to somehow argue for free-market we cannot simply resort to something (in this case – freedom) that is simply defined in terms of something we are going to argue for (in this case: the Nozickian unbridled free market).

Having established that, Nozick's argument for unbridled free markets from the apparent absence of unfreedoms thereupon, though coherent, is at best circular; and at worst – on a neutral definition of freedom – simply false.

3. Rights-based Voluntariness Alone Cannot Do: the Problem of Bequeathing

Our next point, as promised, is related to the institution of bequeathing (or just plain gift-giving).[7] Suppose I am an owner of a parcel of land which is no longer of any use to me. I recall that my best friend did me a favour for which I merely expressed my gratitude. Being spiritually elevated at the moment, I decide to open-handedly transfer my ownership of the land to him. Note, before the transfer is effectuated, the right distribution is simple: I am an owner of the land and my friend owes me only the duty of non-interference. Once I transfer my ownership to him, the legal positions swap. He becomes an owner and now it is I who owes him a duty of non-interference with his exclusive control of the land. Which *fact* can account for this redistribution of right? Intuitively speaking, whether this fact is purely natural or normatively-tinted, it had better not be tinted with rights. For if it is, we would be running in a circle yet again, or *regressus ad infinitum* would be looming. Consider, if the explanation of giving up a right would take pointing to another right, then the question might arise: how was the second right acquired? This in turn, would point to a third right, of which we may ask the very same question? How was the third right acquired? Did somebody else transfer it to you? How did he do it? And so on, and so forth. If instead, we can ultimately point to some right-independent fact, the explanation of bequeathing would be complete. Luckily, Hohfeldian powers come in handy at this point [5]. On the will theory of rights[8] (to which libertarians subscribe), to have a Hohfeldian right is to a have claim against a particular person or people at large demanding their non-interference (as in the case of negative duties) or positive actions (as in the case of positive contractual duties); and, critically for our purposes, a Hohfeldian right also implies *powers* of two sorts: a power of waiver and power of demand. This establishes that it is the right-holder himself that may either absolve a duty-bearer of his duty or demand its performance. The exercise of powers demands an exercise of a voluntary (in a descriptive rights-independent sense) choice on the part of the power-holder. The quote from Olsaretti shall aptly illustrate our point:

> Now, we need an account of the circumstances under which an action that seems to consist in the exercise of a power is indeed such. Your full property rights in your computer, for example, consist, among other things, in your having a power to hire it out; in order to know whether a particular transaction in which someone else has come to control and use your computer and you have come to earn £10 weekly in exchange for that respects your property rights, we need to know whether that transaction occurred voluntarily. (We would think it a breach of your property rights if someone removed your computer without your consent and then paid £10 weekly into your bank account.) Similarly with self-ownership. We could not make sense of the idea of full private ownership over something without the idea of what counts as a choice to use or transfer that thing in the relevant sense (so that the use or transfer of that thing is deemed to be rights-respecting), and correspondingly, of what counts as choice-disrupting, and hence rights-breaching, interference. The notion of consent, or that of the power to exercise or waive a right, are integral to all libertarian rights, and any full statement of these notions will implicate some notion of voluntariness, or freedom as a quality of our choices [9, p. 9].

Funnily enough, libertarianism needs a right-independent notion of voluntariness even to make sense of self-ownership. There are libertarians – most notably, Walter Block, who argue, and rightly so, that self-ownership is alienable, that is one can legitimately sell oneself into slavery [2].[9] How to account for such a dramatic transfer of the most fundamental libertarian right from a former self-

owner to a present master? The answer should be obvious by now: a present slave exercised his power (and voluntarily so in a right-independent sense) and thus effectively gave up his right. It was his voluntary (understood psychologically? or as a felicitous Austinian speech act?) act, whose independence of rights must be affirmed on logical grounds alone, as established above, lest we are going to end up with either circularity or *regressus ad infinitum* [2].

Finally, our attempt to argue for such a *concept* of voluntariness that would be rights-independent tallies well the rather intuitive requirement that moral properties should ultimately rest on natural properties. Even if we put meta-ethical disputes aside and abstract from the question whether a normative property is reducible or irreducible to natural properties[10], it would be indeed a really weird ontology which would allow for free-floating moral properties. After all, it is – in the end – some *natural fact* that count *morally* or *normatively* for that matter. Even such moral philosophers representing mutually inconsistent meta-ethical views as Derek Parfit and Michael S. Moore agree that it is natural facts that count as reasons (of whatever nature, be it moral, egoistic or epistemic) although they express this view in a slightly different language [7], [10]. Parfit says that the fact that "your wine is poisoned" [10, pp. 279-280] has a *normative importance* (which is, in his meta-ethical view, a distinct property attributable to this very fact), which means that it counts in favour of not drinking it; or, in other words, this fact gives a reason not to drink it. Moore, on the other hand, says that moral properties *supervene* on natural properties [7]. The relation of supervenience is that of asymmetrical covariance. That is, if we say that moral properties supervene on natural properties, what we mean is that if there is a change in *the moral*, this implies a change in the natural world broadly conceived[11] (another natural fact must account for the change in morality). However, the converse does not hold true. This is reflected in the levels of culpability. When an actor's culpability is relatively lower, e.g. he negligently (he should have seen to it that the man did not get shot; that is, a reasonable man would have done so) shot another man, this is usually due to the *fact* that he did not intend to shoot the man in the first place (a psychological fact). By contrast, if his level of culpability increases (e.g. criminal law kicks in and our actor is accused of premeditated murder – shooting the victim with cold blood – with the deprivation of his liberty being a possible sanction), this in turn can be accounted for by *another* natural (psychological) *fact* that our actor *caused harm intentionally*. Therefore, a level of culpability appears to be *a function* of *natural facts*. As we can see then, our agenda of rendering voluntariness independent of rights fits the agenda set by the above-mentioned philosophers occupying highly divergent meta-ethical positions.

4. What Counts As a Right Violation or a Threat Thereof

We believe that as much as giving up a right (transferring ownership in case of bequeathing or gift-giving) requires a *separate* question of whether it was done voluntarily, so does a right violation or a threat thereof. After all, as implied in the previous section appealing to Hohfeldian powers, it is the right-holder who is a sort of sovereign who *exclusively decides* by exercising his powers whether the correlative duty bearer's duty is *waived* or *demanded* [5]. In other words, on this (will-theory) understanding of having a right, it is the right-holder himself whose decision has a bearing on whether a given action or forbearance (both being able to constitute a content of a right) is permissible or impermissible. In other words, our position is the reverse of the Rothbardian position cited at the beginning of the introduction [11]. We for one believe that it is not the case that we act voluntarily as long as rights are respected. We would rather say that rights are respected as long as we act voluntarily. For if I even implicitly agree to being hit by person A then person A hitting me cannot constitute a right-violating act. Our position, it might be objected, is only trivially true for by this even implicit agreement to being hit, the right was waived and the duty of the would-be hitter was waived, thus leaving a hitter with a liberty to hit me; so, in the end, there was, logically speaking, no way to violate rights because at that time there were no rights to be violated. But this objection actually counts in our favour. This shows, as in the case of gift-giving, that it is voluntary (in a right-independent sense) decisions that can redistribute rights, as opposed to the

claim that *voluntariness*/*involuntariness* of A's actions is a function of whether rights are respected/violated.

Similar remarks apply to a libertarian notion of threat.[12] As posited by Wertheimer, the rule of a thumb is that a proposal is coercive (but not necessarily it actually coerces[13]) when what is threatened is a right-violating act [13]. But this only postpones our objection and shifts it one step further. For now, the *coercive nature* of *a proposal* seems to depend on whether the threat – when executed – would constitute a violation of the victim's right. But then again, whether a right-violation would occur can be known only if we know whether this "threat" was welcome. If it was, then it was not a threat at all. But still, our dialectical adversary might object that after all we *assumed* it was a threat in the first place; and so, it is a conceptual impossibility to consent to a proposal which amounts to a threat. And yet again, we concur. We would in response maintain that this apparent "threat" misfired only because it was infelicitous – and mainly for one reason here. The potential victim welcomed the proposal. And it is because of this (implicit?) consent, the proposal cannot count as a threat. So, in the end, it transpires that a threat is consent-dependent and not the other way round. Let us illustrate our point. Consider, an eccentric wrong-doer comes to person A and says: "I will take all your money and donate it to charity if you don't stop trading with my enemy". *Prima facie*, this would be classified as a wrongful proposal since "taking person A's money" would be presumed to be wrongful (to violate A's property right). And yet, isn't it imaginable that A wanted to donate all his money to charity and was only waiting for an opportunity to arise to do so. Now A wants "the threat" to be executed and she might manipulate the threatening party to carry out his threat. The threatened party may (ironically) say: "I will never ever stop trading with your enemy". And if the apparent "threat" is carried out, the threatened party is rendered better-off. We might conclude that the threat misfired; or, it was not a threat at all. But why so? Because the proposal was welcomed by the other party. Because the other party *actually wanted* the scenario the threatening party threatened him with to materialize. It is the threatened party (among other things) *preferences* that rendered this threat infelicitous. Also Feinberg, while considering a slight different political problem (that is, the legitimacy of interfering with a person's liberty in the context of soft paternalism) comes up with a similar intuition:

> If we can somehow rescue the isolated mountaineer […] by altering the naturally coercive circumstances in which he finds himself, perhaps by quenching the fire on an escape route that that is more safely accessible, or by landing a helicopter to evacuate him, then we implement his free choices rather than interfere with his liberty. But what if he declines our help, having by now set his heart on the more exciting dangerous exploit he had already planned? In that case, provided he does not appear wild-eyed and hysterical, we must concede that his choice, while foolish, is nevertheless truly his, and he must be permitted to act on it, just as he would in the normal cases of dangerously exciting sport [4, p. 155].

As noted above, the context is slightly different but the reason for the invalidity of intervention is precisely the same as ours. That is, it points to the actor's *true preferences* as *premises* in the reasoning about whether an intervention in that case would count as a legitimate intervention or indeed as an infringement of the said actor's rights. Then, Feinberg instructively continues, extrapolating his argument so that it can yield support to the point we were pressing above:

> Ironically, his risky act [of the mountaineer] is now clearly voluntary only because we intervened to change the coercive circumstances that had appeared to render his choice of that act considerably less than fully voluntary. It is as if, having been liberated from the gunman A, B calmly reconsiders and decides to do what A was trying to force him to do [4, p. 155].

So, the coercive circumstances only "appeared" to render B's choice less than fully voluntary. Whether they *actually did so or not* is ultimately contingent upon the actor's true preferences. The same applies to the gunman case. Whether the gunman's proposal is coercive is ultimately a function of whether the proposal was welcomed (by the putative victim) or not. If B, after some deliberation, decides to do (which is an expression of his true preferences) what he was apparently "forced" to do, then he was not actually forced to do so; and, as Feinberg would have it: the interference with B's action (which was only apparently forced) would count as an illegitimate constraint of B's liberty.

Just to summarize our points in this section:

1) On any non-moralized theory of threat, a proposal cannot be a threat if it cannot render a threatened party (by succumbing to it) worse off than he would otherwise be (in the absence of the proposal). So, if such a proposal cannot count as a threat, it cannot *a fortiori* be an illegitimate threat, which is the one threatening a right-violation, and thus being an instance of a *coercive* proposal itself.

2) We claim that any moralized theory is coherent but it begs the question. For we cannot know whether a proposal is a threat (relative to a moralized benchmark[14]) unless *we first establish* that a threatened action is unconsented.[15]

5. Conclusion

In this short paper, we were trying to argue that libertarianism conceptually craves for the adoption of right-independent concept of voluntariness. First, we established that libertarians cannot convincingly argue for unbridled free markets once they are confined to right-dependent sense of freedom. More specifically, it cannot be informatively (non-trivially) said that a libertarian society (the one in which private property rights are respected) contains no unfreedoms since unfreedoms are *defines* as incompatible with a libertarian society. Second, we adduced Hohfeldian powers to make a point that it is non-rights-based voluntariness that can explain rights redistribution, which would make again the notion of *voluntariness* more fundamental than the concept of right. Finally, by the same token, we claimed that it is consent that is a determinative factor of whether a right was violated or not. We do not contend that libertarianism is caught in an insuperable predicament but rather that more conceptual work is to be done.

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Notes

1. Just to avoid clumsiness of our prose, we shall henceforth use the word *libertarians* to refer to right libertarians. And, however controversially, we take Nozick and (later on) Rothbard to be the main representatives thereof.
2. Whether the Nozickian notion of *voluntariness* differs from the Rothbardian *freedom* is open to dispute. It can be argued that the distinction between freedom and voluntariness can be linguistically captured by the two phrases, respectively: *being free to act* vs *acting freely*. And so, *freedom* would be about the set of actions open to us, while *voluntariness* would be about the quality of our actual action. However, those fine distinctions are of little importance here, for these two *concepts* would be normatively tinted for both libertarians under consideration herein.
3. Cohen's (1995, p. 23) interpretation of Nozick assumes the following form: "Whatever arises from a just situation as a result of fully voluntary transactions which all transacting agents would still have agreed to if they had known what the results of so transacting were to be is itself just."
4. The troubles that rights-based idea of liberty leads to are going to be analyzed in detail in the next section.
5. This time (after the substitution) one would make a case for free-market based on its purportedly fully voluntary character. Yet, this point would be simply trivial for the only transactions that would count as voluntary would be the ones compatible with free-market by definition. Then, the resort to voluntary transactions in making a case for free market is just an illusion. Free market remains groundless since it appeals to voluntary transactions, which are not independent of free market but are definitionally bound to it.
6. For more on incidents of property rights, see [6]**.**
7. In fact, the same problem applies to any mutual exchange on the market.
8. On the will theory vis-à-vis interest theory of rights, see [8].
9. Notably, Nozick [8] also argued in favour of voluntary slavery.
10. For an excellent overview of possible meta-ethical standpoints, see [10].
11. More specifically, Moore [7] argues that it is especially *causation* (an actor causing a prohibited state of affairs) that matters for the ascription of moral blameworthiness, which in turn allows us to ascribe to the actor legal liability.
12. For a comprehensive review of moralized and non-moralized theories of threats and offers, see [4]. On a moralized theory of coercion, see [13].
13. More specifically, Wetheimer [13] maintains that a sufficient condition for a proposal to be *coercive* is that it threatens (in case a victim does not succumb to a threat) a violation of the victim's right. For a proposal to *actually coerce* the above condition (which is now only a necessary condition) and additionally a choice prong (the victim should not have a reasonable alternative but to succumb to a threat) must be satisfied.
14. See [13].
15. Certainly, our position is also vulnerable to criticism. It may be argued that certain proposals necessarily constitute threats and so they automatically vitiate any consent. However, such an argument cannot be considered universal. Pragmatically speaking, it may turn out that there are certain proposals to which nobody of a right mind would give a rational consent. This would enable the law in question to serve some useful purposes and to make some well-grounded verdicts. Yet, this is only an approximation (especially in the eyes of libertarians) to the ideal evidence wherein it could be established beyond reasonable doubt that a right was in fact not violated simply because a purported victim wanted the very state of affairs "prohibited" to actually occur.